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**The Board:** The Board finds that Article VI, Section C is nonnegotiable. The CMPA reserves to management the right to assign employees and to direct the workforce. The highlighted language in the above proposal - "[t]he supervisor will not cancel or reschedule leave previously approved except for emergency reasons" - prevents management from canceling or rescheduling leave, except for a specified reason. Therefore, the proposal places a restriction on management's right to assign employees and direct the workforce. The fact that the parties previously negotiated language whereby management waived this management right "shall not be interpreted in any manner as a waiver of the sole management rights contained in subsection (a)." D.C. Code § 1-617.08(a-1) (Supp. 2005). Thus, Article VI, Section C is nonnegotiable.

## ARTICLE VI

*Section H -- Union Business It is agreed that all duly authorized delegates or alternate delegates (maximum of seven (7)), to the AFGE Convention will be granted administrative leave to whatever extent necessary for their travel to, attendance at, and return from the site of the Convention. The Union shall provide the Employer with reasonable notice of the participants requiring leave to attend.*

**District of Columbia Fire and Emergency Medical Services Department:** The Agency declares Section H of Union's proposed Article VI nonnegotiable because this section interferes with management's rights under D.C. Code § 1-617.08 (2001 ed.) insofar as it implies that the Union determines how much leave is necessary to attend the AFGE Convention. As stated above, determination of necessary leave and whether such leave may be granted in accordance with the requirements of the Agency, are issues of management right and cannot be bargained away pursuant to D.C. Code § 1-617.08(a-1). In addition, the Agency contends that D.C. Code § 1-617.04 prohibits the District from assisting in the formation, existence or administration of a labor union and further prohibits it from financially supporting a union. To pay employees to attend internal union activities, including the union's national convention, would be to contribute financial support to the union and provide assistance in the performance of union-only activities. Should the District assist the labor organization and/or financially support it, the District would be committing an unfair labor practice. (See Appeal at p. 6).

In this regard, the Agency cites Federal Labor Relations Authority ("FLRA") caselaw at Dept. of Health & Human Services, SSA and AFGE, SSA General Committee, 46 FLRA No. 101 (January 8, 1993), for the premise that an agency is prohibited from funding union members' attendance at convention functions that do not involve general labor relations or representational matters. Management notes that it is not uncommon for unions to pay "lost time" for employees to engage in union activities when employees opt not to use their personal leave. The Agency maintains that "lost time" payments are the same as paying the employees the amount they would have earned in wages had the employees worked on those days. The Agency claims that the statute clearly distinguishes: (1) granting financial support to the union by subsidizing its activities and (2) granting official time for representational duties. Specifically, D.C. Code § 1-617.04 states that "the

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District may permit employees to negotiate or confer with it during work hours without loss of pay” and this distinction is further highlighted in of D.C. Code § 1-612.03.<sup>12</sup> The Agency argues that, clearly, official time was not intended to be used for purely internal union activities. Accordingly, the Agency claims that it is prohibited from funding internal union affairs, including attendance at the union’s national convention. (See Appeal at pgs. 6-7).

**American Federation of Government Employees, Local 3721:** The Union argues that the language in this proposal is lifted almost verbatim from the Fire Fighters’ 2004-2007 agreement. The Union claims that the only difference is that the Fire Fighters’ contract states that such leave is to be ‘annual leave’ while the above proposal is for administrative leave. The Union further argues that management has in 50 percent of the cases granted administrative leave, rather than annual leave, in response to requests for union members to attend a National Union meeting. Therefore, the above proposal is negotiable. (See Reply at pgs. 10-11).

In addition, the Union argues that OLRCB’s reliance on 46 FLRA No. 101 (1993) is misplaced. That case involved an arbitrator’s interpretation of 5 U.S.C. § 713(b), a provision of federal law for which there is no comparable provision in the D.C. Code. Furthermore, the arbitrator determined that the federal law in question did not prohibit the federal agency from providing administrative leave to attend a union convention, only that administrative leave could not be used for the entire period of the convention. The Union argues that while this subject lends itself to compromise, it is negotiable. (See Reply at p. 12)

**The Board:** We request that the parties brief Article VI, Section H. Specifically: (1) brief the issue of whether management can grant administrative leave to union representatives for travel, attendance and return from the site of the union convention; (2) provide any law, rule, regulation or Board precedent in support of your respective position; and (3) note the statutory

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<sup>12</sup> D.C. Code §1-612.03 provides as follows:

In units where exclusive recognition has been granted, the Mayor or appropriate personnel authority may enter into agreements with the exclusive bargaining agent to continue employee coverage under the provisions of this chapter while an employee(s) serves in a full-time or regular part-time capacity with a labor organization at no loss in benefits to the individual employee(s): Provided, however, that the cost to the District shall be paid by the labor organization while the employee(s) is so engaged, and ... Provided, however, that this provision shall not limit the negotiability or use of official time by unit employees “for the purposes of investigation, processing, and resolving grievances, complaints or any and all other similar disputes.”

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provision at D.C. Code §1-612.03(p).<sup>13</sup> Describe whether this provision impacts on your position; and if so, how.

## ARTICLE VII

**Section A – Ambulance Units:** *Ambulance units, including Basic Life Support Units and Advanced Life Support Units, shall only be staffed by certified civilian emergency services personnel.*

**District of Columbia Fire and Emergency Medical Services Department:** The Agency contends that this issue is nonnegotiable because D.C. Code § 1-617.08(a-1) forbids surrendering management rights. The Agency asserts that Article VII, Section A interferes with management rights under D.C. Code § 1-617.08(a)(2) to assign employees in positions within the agency. The Agency argues that the Union is attempting to bind the Agency to assign only certain personnel to certain positions. Management claims the right under D.C. Code § 1-617.08 (a)(5)(B-C) to determine the number, types, grades and positions of employees assigned to an agency's organizational unit, work project or tour of duty and the technology employed in performing said work. Should management wish to assign different types of positions to an ambulance, it has the sole right to do so. (See Appeal at p. 8).

**American Federation of Government Employees, Local 3721:** The Union claims that the parties have negotiated over the assignment of certain personnel to certain positions and have done so as recently as in the 2004 Firefighter/Paramedic collective bargaining agreement. Also, management has agreed to limit the individuals who may participate in a training program as well as the required content of the training program. The Union maintains that "[t]he same management rights OLRCB suggests are impacted by the Union's [current] proposal were equally impacted by the agreement made with the [Fire Fighters in the past]. [The Union claims that] [i]f those rights were not inviolate under the statute in 2004, and they were not, then they are not inviolate now." (Reply at pgs. 12-13).

**The Board:** We find that Article VII, Section A is **nonnegotiable**. D.C. Code § 1-617.08(a)(2) reserves to management the right to assign employees in positions within the agency and § 1-617.08(a)(5)(B) reserves to management the right to determine the "number, types and

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<sup>13</sup> D.C. Code § 1-612.03(p) provides as follows: "In units where exclusive recognition has been granted, the Mayor or an appropriate personnel authority may enter into agreements with the exclusive bargaining agent to continue employee coverage under the provisions of this chapter while an employee(s) serves in a full-time or regular part-time capacity with a labor organization at no loss in benefits to the individual employee(s): Provided, however, that the cost to the District shall be paid by the labor organization while the employee(s) is so engaged, and: Provided, further, that this provision shall not limit the negotiability or use of official time by unit employees for the purposes of investigation, processing, and resolving grievances, complaints or any and all other similar disputes."

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grades of positions assigned to an agency's organizational unit, work project or tour of duty". The phrase "[s]hall only be staffed by" is mandatory language. Therefore, it has the effect of restricting the agency in assigning employees to ambulance units. This interferes with management's sole right to assign.

The Union argues that the parties have previously negotiated over this issue. However, the amendment to the CMPA at D.C. Code § 1-617.08(a-1) (Supp. 2005), provides as follows: "[a]n act, exercise, or agreement of the respective personnel authorities (management) shall not be interpreted in any manner as a waiver of the sole management rights contained in subsection (a) of this section." Thus, a prior agreement between the parties concerning a statutory management right cannot be interpreted as a waiver of that right.<sup>14</sup> Therefore, Article VII, Section A is nonnegotiable.

#### **ARTICLE IX**

*Section C – Drug Testing: The Department shall determine the component of its workforce that shall be required to participate in a mandatory drug testing program. The parties recognize that any new or modified procedures shall be the subject of mutual agreement between the parties. It is jointly understood that involvement of any on-duty member of the Department in an accident while operating any Department vehicle shall provide sufficient cause for immediate drug screening in accordance with Federal Department of Transportation guidelines.*

**District of Columbia Fire and Emergency Medical Services Department:** The Agency declares Section C nonnegotiable because it interferes with management's rights under D.C. Code § 1-617.08. Management claims the right to establish internal procedures, such as a drug testing program, to insure security and efficiency in the workforce. Aspects of this program, such as randomness and timing, are not properly subjects of working condition negotiations. The parties must bargain regarding implementation and effect of such a procedure if one party requests it, but the substantive nature of such procedures is not subject to negotiation. (Appeal at p. 8).

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<sup>14</sup> The Board made a similar finding before the amendment was passed. In *International Association of Firefighters, Local 36 and District of Columbia Fire Department*, 35 DCR 118, Slip Op. No. 167 at p. 4, PERB Case No. 87-N-01 (1987), this Board found that "the parties' previous practice is not relevant to the Board's consideration of whether Article 18 [the proposed article pertaining to the number of employees assigned to a tour of duty] is a bargainable subject under the CMPA. [Stating that] [i]t is our view that the Union's proposal to maintain the requirements set out in Article 18, directly interferes with DCFD's right to determine the numbers of its employees assigned to a particular organizational unit; hence, it is nonnegotiable."

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**American Federation of Government Employees, Local 3721:** The Union opposes management's argument that this proposal interferes with the Agency's right to "establish internal procedures" arguing that management bargained over this same language in the past. (Reply at p. 13).

**The Board:** Article IX, Section C is negotiable. This proposal addresses the procedural aspect of management's drug testing program. Implicit in any change in the stated procedure is management's duty to give notice to the Union in order to provide the Union with the opportunity to bargain over the change in procedure. The Board has held that management need not bargain over the *decision* to establish a drug testing program. See *Teamsters Local Union 639 a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO v. District of Columbia Public Schools*, 38 DCR 3313, Slip Op. No. 274 at p. 2, PERB Case No. 90-N-02 (1991), where the Board held that the decision to adopt drug testing was management's right. Here, Article IX, Section C pertains to drug testing procedures and does not prevent management from establishing a drug testing program. Therefore, it is negotiable.

Regarding the Union's argument that this proposal was previously negotiated, pursuant to D.C. Code § 1-617.08(a-1) (Supp. 2005), "an act, exercise or agreement of the respective personnel authorities (management) shall not be interpreted in any manner as a waiver of the sole management rights contained in subsection (a) of this section."

## **ARTICLE X**

**Section A – Shift Assignments:** *Shift assignments shall be made on a volunteer basis. In the event there are not enough volunteers to staff the shifts, or if there are too many volunteers for a given shift, shift assignments shall be determined on a seniority basis. Seniority is defined as time served in the EAB. The employee with the highest seniority will be offered the choice of the possible slots and the employee with the next highest seniority will be offered the choice of the remaining slots. This procedure will be continued until all employees have been assigned shifts.*

**Section B – Shifts:** *Unit Employees, except those assigned to Fleet Maintenance, Clerical or Warehouse duties, shall work twelve hour shifts as their normal scheduled daily tour of duty.*

**Section C – Modifications:** *Except in cases of emergencies or unforeseen staffing needs, modifications to this schedule may only be made provided the following criteria are met:*

- (a) *At any hour of the day, the likelihood of unit availability increased by five percent (5%) or more over the preceding six month period; and*

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- (b) *At any hour of the day, unit response time increased by five percent (5%) or more over the preceding six month period.*

*If any modifications are made to the schedule, the Agency will post, no less than 30 days prior to implementation of any schedule modification, except in the event of an emergency or unforeseen staffing workload change, the new schedule so as to give sufficient notification to the affected employees. The posted schedule will include shift starting and quitting times, the days of the week each employee will work and any other related or pertinent information.*

**Section D – Tour of Duty: Tour of Duty will be as follows:**

2 on, 2 off  
3 on, 2 off  
2 on, 3 off

**Shift Starting and Quitting Times:**

7:00 AM to 7:00 PM  
7:00 PM to 7:00 AM

**District of Columbia Fire and Emergency Medical Services Department:** The Agency declares the Union's proposed Article X nonnegotiable in its entirety because its provisions interfere with management's rights under D. C. Code § 1-617.08(a)(1) and (2) and D.C. Code § 1-617.08(a)(5)(A). These sections of the statute grant the Agency sole right to direct and assign employees and to establish the tour of duty. Each provision of Union's proposed Article seeks to improperly restrict the Agency's rights. In Section A, for example, the Union proposes that "shift assignments shall be made on a volunteer basis." Section B would dictate the "normal tour of duty" in complete contravention of §§ 1-617.08(a)(5)(A) and (B). The Agency asserts that Section C of Article X would restrict management from changing tours of duty and Section D would "establish" the tour of duty. Were the Agency to agree to such language, it could no longer freely exercise its ability to assign employees. The Agency maintains that the statute forbids the agency to enter into such an agreement and is unequivocal in its reservation of these rights "solely" to management. As a result, all of the provisions proposed in this article are nonnegotiable. The statute is absolutely clear, and such a proposal by the Union clearly raises the question of whether the Union is bargaining in good faith.

**American Federation of Government Employees, Local 3721:** The Union argues that Section A of this proposal was awarded in interest arbitration during the last round of negotiations, claiming that interest arbitration can only occur over subjects that are deemed negotiable. The

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Union cites *Teamsters, Local 639*,<sup>15</sup> for the proposition that “bargaining over the subjects contained in the Union’s proposal was not proscribed.” The Union asserts that in light of the recent legislative amendment, it is not only negotiable, “it is now mandatory.” (Reply at p. 14).

**The Board:** **We request that the parties brief Article X - (A), (B), (C), AND (D).** The Board finds that there is insufficient information to make a determination on the issues raised in this proposal. Therefore, the parties shall brief Sections A, B, C and D of Article X. Specifically, the parties shall define the following items: “*scheduling*”, “*hours of work*”, “*tours of duty*”. In addition, the parties shall state their positions on the negotiability of each term. In addition, the parties shall explain which term applies to Section A, Section B, Section C and Section D. Also, the parties shall show how the terms apply to every portion of each section. We request that the parties be specific concerning Board case law supporting your position. Specifically, cite any law, rule, or regulation that supports your position.

#### **ARTICLE XI**

**Section A – Promotional Process:** *The Promotional Process shall be as follows:*

(1) *To be eligible for promotion to the position of Sergeant employees shall complete the following:*

- (a) *Application as specified in the examination announcement;*
- (b) *Qualifying job related examination;*
- (c) *Evaluation by an assessment center panel;*

*The foregoing promotion procedure implements the following general principles:*

- (1) *Assurance of a fair evaluation of the qualification of candidates;*
- (2) *Establishment of clear procedures and adequate records so that it may be readily determined that promotion actions are taken in accordance with established policies and procedures;*
- (3) *Promotions shall be made by rank order on a non-discriminatory basis;*

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<sup>15</sup> 631 A.2d 1205, p.1208, 1211 (1993).

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- (4) *Promotions within the unit will be made consistent with the equal employment opportunity laws and any affirmative action plan of the District.*

**District of Columbia Fire and Emergency Medical Services Department:** The Agency declares Section A of Union's proposed Article XI, Section A nonnegotiable, asserting that it interferes with management's sole right "to hire, promote, transfer, assign and retain employees in positions within the Agency and to suspend, demote, discharge or take other disciplinary action against employees for cause" under D.C. Code § 1-617.08(a)(2). The Agency argues that the decision to promote is a right granted solely to management, and the union cannot attempt to limit that right through a collectively-bargained provision in a working conditions agreement. (Appeal at p. 11).

**American Federation of Government Employees, Local 3721:** The Union asserts that OLRCB's position is untenable because the promotional process portion of this article is patterned after Article 20 of the Fire Fighters' agreement. In crafting its proposal, the Union simply removed references to positions that are not within its bargaining unit. Given that OLRCB agreed to a highly detailed promotional process with the Fire Fighters, the Union contends that it strains credulity for it now to conclude that it is precluded from bargaining with the Union over the exact same issues.

**The Board:** Article XI, Section A is procedural in nature and is therefore **negotiable**. There is nothing in the proposal that would prevent management from promoting an employee or require management to promote an employee. Therefore, it does not violate D.C. Code § 1-617.08(a)(2) which reserves to management the right to promote.

#### **ARTICLE XI**

**Section C – Paramedic Training Course:** *EMT's who are rated qualified for the Paramedic Training Course and pass the EMT written and practical examination, but are not selected to the course due to numerical limitations shall automatically be eligible without retaking the EMT written and practical examination, for the next scheduled Paramedic Training Course, provided that the employee maintains a satisfactory, or higher, job performance rating, and that he/she meets the requirements for the Paramedic Training Course as specified under official posted announcements. The Department shall assure that prior to taking the pre-paramedic exam, at a minimum, each employee must be currently certified as an EMT for a minimum of one (1) year, have current CPR certification and a current drivers license.*

**District of Columbia Fire and Emergency Medical Services Department:** The Agency declares Article XI, Section C nonnegotiable because it interferes with management's rights under D.C. Code § 1-617.08. Again, the Agency asserts that this proposal attempts to take away

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management's sole right to promote and to determine the number, types, grades and positions of employees. When vacancies arise, management has the sole right to establish the criteria by which employees shall be tested and/or evaluated for promotion. The Agency maintains that it cannot agree to a provision that establishes qualifications and limitations on management's right to promote. Determination of qualifications for employment is solely the right of management. The Agency claims that, as a result, this provision is nonnegotiable. (Appeal at p. 11).

**American Federation of Government Employees, Local 3721:** The Union argues that this proposal was previously negotiated by the parties. The Union has merely removed from a previously negotiated proposal any references to positions that are outside of the bargaining unit. Furthermore, the Union asserts that the portion of the proposal pertaining to paramedic examination is based on management's proposal in the 1992 negotiations. Therefore, the Union reasons that management cannot now claim that this issue is precluded by statute. (See Reply at p. 16).

**The Board:** We find that Article XI, Section A is **negotiable** but not for the reason cited by the Union. This proposal is procedural in nature. The proposal merely preserves for those employees who received sufficient grade scores but who were not chosen to take a course (because the number of students for the course was limited), the opportunity to take the next available course. There is nothing in the proposal that would prevent management from, or require management to, assign or promote an employee. Therefore, Article XI, Section A does not violate D.C. Code § 1-617.08(a)(2) which reserves to management the right to promote, and is negotiable.

## **ARTICLE XII**

**American Federation of Government Employees, Local 3721:** The Union informed OLRCB that it withdrew the above proposal (Article XII) prior to the filing of the instant negotiability appeal.<sup>16</sup> Therefore, it is not necessary for the Board to consider this Article.

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<sup>16</sup> **Article XII:** *Holidays are designated by District Law (D.C. Code § 1-613.2) and D.C. regulations and therefore are not negotiable. Holidays are contained in this Agreement for informational purposes only. Employees covered by this Agreement shall receive the following holidays and will be paid in accordance with the District Personnel Manual (DPM).*

*New Year's Day, January 1st of each year;  
Inauguration Day, January 20th or 21st of each fourth year;  
Dr. Martin Luther King, Jr.'s Birthday;  
Washington's Birthday;  
Memorial Day;  
Independence Day, July 4th of each year;  
Labor Day;  
Columbus Day;  
Veteran's Day, November 11th of each year;*

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## ARTICLE XV

*The Employer agrees that it will not discriminate on any basis and that the compensation provided to unit employees shall be no different than for any other employee performing the same work.*

**District of Columbia Fire and Emergency Medical Services Department:** The Agency declares the Union's proposed Article XV nonnegotiable in its entirety asserting that it falls outside the scope of working conditions negotiations because it addresses compensation issues. The bargaining unit represented by the Union in this Appeal has been included in Compensation Units 1 and 2 by the Board. The Agency asserts that employees in the bargaining unit shall be paid in a manner consistent with the negotiated pay in the Compensation Units 1 and 2 agreement.

**American Federation of Government Employees, Local 3721:** The Union argues that past collective bargaining agreements contain provisions related to compliance with the equal employment opportunity laws that regulate the District. The proposal seeks to contractually establish the law of equal pay for equal work. It does not establish any particular rate of pay, nor does it infringe on the areas exclusively reserved for compensation negotiations.

**The Board:** Article XV is **nonnegotiable** as a working condition and should be addressed in the compensation negotiations because it concerns wages. However, there is nothing preventing the parties from negotiating a non-discrimination clause. Had the non-discrimination proposal been standing alone, it would have been negotiable.

Regarding the Union's argument that this proposal was previously negotiated, pursuant to D.C. Code § 1-617.08(a-1) (Supp. 2005), "an act, exercise or agreement of the respective personnel authorities (management) shall not be interpreted in any manner as a waiver of the sole management rights contained in subsection (a) of this section."

## ARTICLE XX

**Section B(2)(c):** *Requests [for voluntary transfer] shall be endorsed by the employees immediate supervisor and Bureau Head and forwarded in a timely manner.*

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*Thanksgiving Day;  
Christmas Day, December 25th of each year; and*

*The Mayor or his/her designee may specify other days or portions of a day as non-work days, in addition to the above legal public holidays.*

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**District of Columbia Fire and Emergency Medical Services Department:** The Agency declares Section B(2)(c) of Union's proposal nonnegotiable because it interferes with management's rights. D. C. Code § 1-617.08(a)(2) grants management the sole right to determine the propriety and necessity of transfers, assignments and appointments. Therefore, management cannot agree to limit the exercise of these rights by accepting a mandatory system wherein requests for voluntary transfer are automatically and in all cases endorsed by a supervisor.

**American Federation of Government Employees, Local 3721:** The Union argues that Section B(2)(c) is patterned after provisions that were previously negotiated in a 2004 collective bargaining agreement, and are therefore negotiable.

**The Board:** Article XX, Section B(2)(c) is **nonnegotiable**. The CMPA has reserved to management the right to "hire, promote, transfer and assign and retain employees in positions within the agency" at D.C. Code § 1-617.08(a)(2). The proposal *requires* management to endorse all requests for voluntary transfers. Thus, Section B(2)(c) interferes with the exercise of management's right to transfer employees within the agency.

Regarding the Union's argument that this proposal was previously negotiated, pursuant to D.C. Code § 1-617.08(a-1) (Supp. 2005), "an act, exercise or agreement of the respective personnel authorities (management) shall not be interpreted in any manner as a waiver of the sole management rights contained in subsection (a) of this section."

## **ARTICLE XX**

**Section B(2)(d)(ii):** *Mutual exchanges of assignment between members of the same salary class shall be permitted upon a determination that the employees are qualified for the assignments requested and concurrence of the appropriate Assistant Fire Chief of Services or Operations.*

**District of Columbia Fire and Emergency Medical Services Department:** The Agency declares Article XX, Section B(2)(d)(ii) nonnegotiable to the extent it interferes with management's rights under D. C. Code § 1-617.08(a)(2). The Agency argues that management has the sole right to determine the propriety and necessity of transfers, assignments and appointments. Therefore, it cannot agree to limit the exercise of these rights by accepting a mandatory system wherein requests for mutual exchange of assignment are automatically and in all cases endorsed by a supervisor or Agency official.

**American Federation of Government Employees, Local 3721:** The Union claims that Section B(2)(d)(ii) is patterned after provisions that have been previously negotiated, and is therefore negotiable.

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**The Board:** Article XX, Section B(2)(d)(ii) is negotiable. The CMPA has reserved to management at D.C. Code § 1-617.08(a)(2) the right to “hire, promote, transfer and assign and retain employees in positions within the agency”. Consistent with this management right, the proposal allows exchanges of assignments between members of the same salary class only after the employees meet qualification requirements and obtain approval from management. The proposal reserves to management the right to say no to voluntary exchanges of like workers. Thus, management’s right to transfer and assign employees is not restricted.

Regarding the Union’s argument that this proposal was previously negotiated, pursuant to D.C. Code § 1-617.08(a-1) (Supp. 2005), “an act, exercise or agreement of the respective personnel authorities (management) shall not be interpreted in any manner as a waiver of the sole management rights contained in subsection (a) of this section.”

#### **ARTICLE XX**

*Section D – Acting Pay: An employee detailed or assigned to perform duties at a higher-graded position for more than 90 consecutive days shall receive acting pay and have their pay adjusted to the higher rate of pay beginning the first full pay period following the 90-day period. Employees assigned or detailed to a higher-graded position shall not be arbitrarily removed from the detail and then reinstated to the detail in order to avoid acting pay. When it is known in advance that a higher graded position must be filled for more than 90 days, Management will fill said position by a temporary promotion.*

**District of Columbia Fire and Emergency Medical Services Department:** The Agency declares Article XX, Section D nonnegotiable asserting that it interferes with management’s rights under D.C. Code § 1-617.08(a). The Agency claims the sole right to determine the propriety and necessity of transfers, assignments and appointments. It concludes, therefore, that it cannot agree to limit the manner in which it fills its positions. According to the Agency, restrictions governing transfers, details and reassignments must come from District law or regulation, as referenced in the statute, and are not subject to collective bargaining.

**American Federation of Government Employees, Local 3721:** The Union maintains that section D was previously negotiated and is therefore negotiable.

**The Board:** Article XX, Section D is nonnegotiable. It requires the Agency to fill a position by promotion, rather than by detailing someone to the position. D.C. Code § 1-617.08(a)(2) provides that states that management “shall retain the sole right to . . . promote. . . .” In response to the Union’s argument that this issue was previously negotiated, the amendment to the CMPA provides that, “[a]n act, exercise or agreement . . . shall not be interpreted in any manner as a waiver of the sole management rights contained in subsection (a) of this section.” D.C. Official Code D.C. Code § 1-617.08(a-1) (Supp. 2005).

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## ARTICLE XX

*Section E – Ambulance Crewmember in Charge (ACIC): There shall be no bumping privileges. The ACIC of an ambulance or a medic unit shall be determined by ACIC seniority. Ambulance crew member in charge - seniority shall be determined by the latest date of appointment as an ACIC. When two qualified ACIC's are assigned to an ambulance or a medic unit and one must be detailed due to staffing shortages, emergency or other unforeseen reason, the ACIC of the ambulance or medic unit shall not be detailed or otherwise moved.*

**District of Columbia Fire and Emergency Medical Services Department:** The Agency declares the proposal in Article XX, Section E nonnegotiable because it interferes with management rights. D.C. Code § 1-617.08(a)(5)(B) grants solely to management the right to determine the number, types, and grades of positions of employees assigned to an agency's organizational unit, work project or tour of duty. The Agency claims the sole right to determine the propriety and necessity of transfers, assignments and appointments. Therefore, the Agency maintains that it cannot agree to limit the manner in which it fills its positions. Management asserts that restrictions governing transfers, details, promotions and reassignments must come from District law or regulation, as referenced in the statute, and are not subject to collective bargaining.

**American Federation of Government Employees, Local 3721:** The Union argues that the proposal in Section E is patterned after a proposal that was previously negotiated in Article 21 of a previous agreement between the parties. The Union asserts that the parties have bargained and agreed to an elaborate selection system, based in part on the length of time an applicant has been employed in a particular position. The Union claims that OLR CB cannot *now* argue that "restrictions governing transfers, details, promotions and reassignment" are not subject to collective bargaining. (Reply at p. 18).

**The Board:** Article XX, Section E is **nonnegotiable**. D.C. Code § 1-617.08(a)(5)(B) grants management the sole right to determine the "number, types and grades of positions of employees assigned to an agency's organizational unit, work project, or tour of duty". This proposal restrains management from exercising its statutory right to "assign" employees in positions within the agency. In response to the Union's argument that this issue was previously negotiated, "[a]n act, exercise or agreement by . . . management shall not be interpreted in any manner as a waiver of the sole management rights contained in subsection (a) of this section." D.C. Official Code D.C. Code § 1-617.08(a-1) (Supp. 2005).

## ARTICLE XXI

*Section 1 – Intent: Position Descriptions will be prepared to meet the standards of adequacy prescribed in the District Personnel Regulations. Each position covered in this Agreement must be established in accordance with appropriate classification standards and*

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shall be accurately described in writing, classified and certified as to the proper title, series and grade. Position descriptions shall contain the principal duties, responsibilities and supervisory relationships which reflect the series and grade control. The parties agree that position descriptions are only descriptive of the major duties assigned to a position and therefore shall conclude with the sentence: "Performs other related duties."

**District of Columbia Fire and Emergency Medical Services Department:** The Agency declares Article XXI, Section 1 nonnegotiable because it interferes with management's rights under D.C. Code § 1-617.08(a)(5)(B). The Agency claims that it is wholly within the District's discretion to determine the contents of a position description. Management asserts that it is forbidden under D.C. Code § 1-617.08(a-1) from agreeing to curtail this right in any way.

**American Federation of Government Employees, Local 3721:** The Union argues that the previous agreement between the parties has an article devoted to position descriptions. The Union asserts that the OLR CB proposed this exact language in 1992. The Union maintains that bargaining over this subject was not proscribed in 1992 and it is not proscribed now. (Reply at p. 18).

**The Board:** Article XXI, Section 1 is **negotiable**. The Union's proposal does nothing more than assure accurate position descriptions consistent with the requirements of the District Personnel Manual (DPM). There is nothing in the proposal that violates management rights. The phrase "performs other related duties" is neutral and simply adds to the accuracy of the position description. It does not impose any requirements on management, nor does it interfere with management's right to assign work under D.C. Code § 1-617.08(a)(2) or § 1-617.08(a)(5)(B).

## **ARTICLE XXII**

*... The Employee will be given temporary assignments of light duty for which he/she is qualified, initially within his/her own Department.*

*When temporary assignments of light duty are not available for eligible employees within the Department the Employer shall contact the D.C. Office of Personnel and request that the employee be offered a temporary assignment of light duty elsewhere in the D.C. Government. ...*

**District of Columbia Fire and Emergency Medical Services Department:** The Agency claims that the cited section of the Union's proposal is nonnegotiable because it interferes with management's rights under D. C. Code § 1-617.08(a)(2) and (3). The statute reserves exclusively to management the right to assign employees to positions within the Agency and to relieve employees of duties because of lack of work or other legitimate reasons. The Agency is forbidden under § 1-617.08(a-1) from agreeing to curtail this right in any way.

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**American Federation of Government Employees, Local 3721:** The Union argues that the 1989 Agreement between the parties contains a section related to light duty, therefore the subject matter is clearly not "proscribed". The Union asserts that a request that "an employee be given a temporary assignment elsewhere" could be denied or granted and management's argument that the request would infringe on a management right is "speculation." Therefore, the Union maintains that this proposal is negotiable.

**The Board:** Article XXII is **nonnegotiable**. The decision to make a light duty assignment is within management's right to assign work. Furthermore, D. C. Code § 1-617.08(a)(2) grants management the sole right to "assign . . . employees *in positions within the agency*". (emphasis added). Thus, the statute authorizes the Agency to assign employees to positions within the Agency *only*. This proposal exceeds management's statutory authority and is therefore nonnegotiable.

Regarding the Union's argument that this proposal was previously negotiated, pursuant to D.C. Code § 1-617.08(a-1) (Supp. 2005), "an act, exercise or agreement of the respective personnel authorities (management) shall not be interpreted in any manner as a waiver of the sole management rights contained in subsection (a) of this section". Thus, Article V, Section D is nonnegotiable.

### **ORDER**

#### **IT IS HEREBY ORDERED THAT:**

1. **The following proposals are negotiable:**

Article V (H) - employee accepts EAB referral;

Article IX (C) - drug testing procedures;

Article XI (A) - promotional process;

Article XI (C) - paramedic training course;

Article XX (B)(2)(d)(ii) - mutual exchanges of assignments;

Article XXI - position descriptions.

2. **The following proposals are nonnegotiable:**

Article V (D) - employee accepts EAB referral;

Article V (E) - employee rejects EAB referral;

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Article VI (C) - annual leave cancellation;

Article VII (A) - staffing by civilians;

Article XV - compensation for unit employees;

Article XX(B)(2)(c) - transfer requests;

Article XX (D) - details; temporary promotions;

Article XX (E) - remaining Person-in-Charge will not be detailed;

Article XXII - light duty assignments.

3. **The parties shall brief the proposals found at: Article VI(H) and Article X (A), (B), (C), and (D) as set forth below:**

Article VI (H) -

(a) Specifically, brief the issue of granting administrative leave to union delegates to attend the Union's annual convention;

(b) Cite any rule, law, regulation or Board precedent and show how it applies to this proposal;

(c) See D.C. Code § 1-612.03(p).<sup>17</sup> State your position on how this provision affects the issue to be briefed, if at all.

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<sup>17</sup> D.C. Code § 1-612.03(p) provides as follows:

In units where exclusive recognition has been granted, the Mayor or an appropriate personnel authority may enter into agreement with the exclusive bargaining agent to continue employee coverage under the provisions of this chapter while an employee(s) serves in a full-time or regular part-time capacity. Provided, however, that the cost to the District shall be paid by the labor organization while the employee(s) is so engaged, and: Provided, further, that this provision shall not limit the negotiability or the use of official time by unit employees for the purposes of investigation, processing, and resolving grievances, complaints or any and all other similar disputes.

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Article X - (A), (B), (C), (D):

Specifically, the parties shall state their position concerning the negotiability of the following issues:

(1) Define: "shift"; "tours of duty"; "hours of work"; and state whether these terms are negotiable and how they apply to *each* of the following proposals:

Section A - use of a volunteer scheduling system on the basis of seniority;

Section B - twelve-hour shift tours of duty; modifications to the schedule only under certain criteria;

Section C - tour of duty (2 on, 2 off); (3 on, 2 off) and (2 on, 3 off); and

Section D - starting and quitting times (7am to 7pm) and (7 pm to 7 am).

(2) Cite any law, rule, regulation or Board precedent in support of your position concerning the negotiability of subsections a, b, c and d. Be specific when citing Board precedent and state how it applies to the specific portions of the proposal.

4. The parties' briefs shall be filed **fifteen (15) days** from the service of this Decision and Order.
5. Pursuant to Board Rule 559.1, this Decision and Order is final upon issuance.

**BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD**  
Washington, D.C.

February 2, 2007

**Government of the District of Columbia  
Public Employee Relations Board**

In the Matter of:

District of Columbia  
Metropolitan Police Department,

Petitioner,

and

Fraternal Order of Police/Metropolitan

Police Department Labor Committee  
(on behalf of Bridget King),

Respondent.

PERB Case No. 06-A-16

Opinion No. 875

**FOR PUBLICATION**

**DECISION AND ORDER**

**I. Statement of the case:**

The District of Columbia Metropolitan Police Department ("MPD" or "Agency") filed an Arbitration Review Request ("Request") in the above-captioned matter. MPD seeks review of an arbitration award ("Award") which rescinded the termination of Bridget King ("Grievant") a bargaining unit member. MPD contends that the: (1) Arbitrator was without authority to grant the Award; and (2) Award is contrary to law and public policy. The Fraternal Order of Police/Metropolitan Police Department Labor Committee ("FOP" or "Union") opposes the Request.

The issue before the Board is whether "the award on its face is contrary to law and public policy" or whether "the arbitrator was without or exceeded his or her jurisdiction . . . ." D.C. Code §1-605.02(6) (2001 ed.).

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## II. Discussion:

The Grievant began her employment with MPD on April 9, 1989. MPD proposed to terminate her employment based on charges that she was involved in a physical and verbal altercation with another MPD officer on April 13, 2003. On July 29, 2004, MPD served the Grievant with a Notice of proposed Adverse Action.

On August 2, 2004, the Grievant requested a hearing. An Adverse Action Panel, was convened on September 20, 2004. The Grievant pleaded not guilty to Charge One and pleaded guilty to Charge Two.

On November 5, 2004, the Panel sustained the charges and recommended termination. On November 5, 2003, MPD informed the Grievant of the final decision to terminate his employment. FOP appealed the matter to the Chief of Police. The Chief of Police denied the grievance and FOP invoked arbitration pursuant to the parties' collective bargaining agreement ("CBA").

At arbitration FOP asserted that MPD violated Article 12, Section 6 of the parties' CBA in that it did not issue its decision within fifty-five (55) days of the date that the Grievant requested a hearing. (See Award at p. 5). Article 12, Section 6 of the parties' CBA provides in pertinent part that an employee "shall be given a written decision and the reasons therefore no later than . . . 55 days after the date the employee is notified in writing of the charges or the date the employee elects to have a departmental hearing." (Award at pgs. 3-4). FOP argued that the Grievant was notified of the charges on July 28, 2004, but was not served with the final decision until November 5, 2004. FOP claimed that because of this violation the termination should be rescinded. (See Award at p. 5).

MPD countered that even if a violation of the fifty-five day rule occurred it was harmless error and that the parties' CBA does not authorize the Arbitrator to rescind the termination. (See Award at p. 5).

In an Award issued on May 15, 2006, Arbitrator Lois Hochhauser concluded that MPD violated Article 12, Section 6 of the parties' CBA when it failed to issue a written decision within the fifty-five (55) days of the date the Grievant elected to proceed with a departmental hearing. Specifically, Arbitrator Hochhauser noted the following:

[The] Grievant requested a hearing on August 2, 2004. The hearing was initially scheduled for August 18, 2004, but was rescheduled at the Grievant's request and was heard on September 20. The Final Notice of Adverse Action was issued on November 5, 2004. Calculating the 55 days from the date of the request [for a] hearing, the decision should have been issued on September 27, 2004. The decision was issued 94 days from the initial date of the hearing request. However, [the] Grievant requested a continuance

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of the hearing date from August 18 to September 20, 2004, thus MPD is entitled to an extension of 33 days since that time period is not calculated into the 55 days. . . . [MPD] issued its decision on November 5, 2004, a period of 62 days from when the request for a hearing was made. (Award at pgs 4-5).

In view of the above, the Arbitrator rescinded the termination and ordered that the Grievant be reinstated with full back pay and benefits. (See Award at p. 8).

MPD takes issue with the Award. Specifically, MPD argues that the: (1) Arbitrator was without authority to grant the Award and (2) Award is contrary to law and public policy. (See Request at p. 2).

MPD asserts that the Arbitrator was presented with two decisions of the District of Columbia Superior Court regarding a remedy for violations of the CBA's fifteen-day rule and fifty-five day rule. (See Request at p. 4). In both instances the cases were before the Superior Court on review of arbitration decisions that reversed the discipline imposed by MPD due to missed contractual time limits. In Metropolitan Police Dep't v. D.C. Public Employee Relations Board, 01-MPA-19 (September 10, 2002), Judge Abrecht reversed the decision of the arbitrator. In the other case, Metropolitan Police Dep't v. D.C. Public Employee Relations Board, 01-MPA-18 (September 17, 2002), Judge Kravitz upheld the decision of the arbitrator. MPD suggests that in the present case, the Arbitrator was guided by Judge Kravitz's decision, therefore, she concluded that she had the authority to fashion a remedy for the failure of MPD to comply with the 55-day rule. MPD asserts that the decision of the Arbitrator was contrary to law and was not based upon any authority set forth in the parties' CBA. (See Request at pgs. 4-5). MPD submits "that the decision of Judge Abrecht should have been followed by the Arbitrator [and not that of Judge Kravitz.]" (Request at p. 6).

In addition, MPD contends that "[t]he failure to comply with the fifty-five day period was harmless in that [the] Grievant was not denied any due process protections. Moreover, [the] Grievant was not prejudiced by the delay because during the period after the expiration of the 55-days, she was in a pay status." (Award at pgs. 6-7). Also, MPD argues that "resolution of this matter should be controlled by *Fraternal Order of Police/Metropolitan Police Department Labor Committee and D.C. Metropolitan Police Department*, Case No. 50620-656821-A (March 14, 2006), where Arbitrator Joan Parker observed that it would be inappropriate to rescind a termination based upon a 55-day rule violation and stressed instead that the 'appropriate remedy for such a violation would be back pay for any pay [g]rievant lost as a result of the delay in [issuing a] written decision beyond the fifty-five days after he elected a hearing.' (Request at p. 7).

MPD notes that the Grievant was found guilty of committing serious acts of misconduct. "If [the] Grievant is reinstated, the nature of her misdeeds makes it unlikely that she would be returned to a full-duty status. Under the circumstances, a remedy of reinstatement would violate the public policy in that [the] Grievant would be unable to provide the services to the public as set forth in D.C. Official Code 2001 Edition . . . ." (Request at p. 7). Also, MPD claims that "[i]t

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is beyond question that the suitability of a person employed as a police officer is an important public policy. [The] Grievant committed her misdeeds while employed as a police officer [and MPD] decided that [the Grievant] was no longer suitable to function in that capacity." (Award at p. 7). Finally, MPD asserts that a remedy of reinstatement returns to MPD an individual "unsuitable to serve as a police officer. Clearly such a remedy would violate public policy." (Request at p. 7).

We have held that "[b]y agreeing to submit the settlement of [a] grievance to arbitration, it [is] the Arbitrator's interpretation, not the Board's, that the parties have bargained for." University of the District of Columbia and University of the District of Columbia Faculty Association, 39 DCR 9628, Slip Op. No. 320 at p. 2, PERB Case No. 92-A-04 (1992). In addition, we have found that by submitting a matter to arbitration, "the parties agree to be bound by the Arbitrator's interpretation of the parties' agreement . . . as well as his evidentiary findings and conclusions . . . . "Id. Moreover, "[this] Board will not substitute its own interpretation or that of the Agency for that of the duly designated arbitrator." District of Columbia Department of Corrections and International Brotherhood of Teamsters, Local Union 246, 34 DCR 3616, Slip Op. No. 157 at p. 3, PERB Case No. 87-A-02 (1987). In the present case, the parties submitted their dispute to Arbitrator Hochhauser. Neither MPD's disagreement with the Arbitrator's interpretation of Article 12, Section 6, nor MPD's disagreement with the Arbitrator's findings and conclusions, are grounds for reversing the Arbitrator's Award. See, MPD and FOP/MPD Labor Committee (on behalf of Keith Lynn), Slip Op. No. 845, PERB Case No. 05-A-01 (2006).

Also, MPD suggests that the plain language of Article 12, Section 6 of the parties' CBA does not impose a penalty for noncompliance with the 55-day rule. Therefore, by imposing a penalty where none was expressly stated or intended, MPD asserts that the Arbitrator added to and modified the parties' CBA. (See Request at pgs. 4-5).

MPD's arguments are a repetition of the positions it presented to the Arbitrator and its ground for review only involves a disagreement with the arbitrator's interpretation of Article 12, Section 6 of the parties' CBA. MPD merely requests that we adopt its interpretation and remedy for its violation of the above-referenced provision of the CBA. This we will not do.

In cases involving the same parties, we have previously considered the question of whether an arbitrator exceeds his/her authority when he rescinds a Grievant's termination for MPD's violation of Article 12, Section 6 of the parties' CBA. In those cases we rejected the same argument being made in the instant case and held that the Arbitrator was within his/her authority to rescind a Grievant's termination to remedy MPD's violation of the 55-day rule. (See, MPD and FOP/MPD Labor Committee (on behalf of Jay Hang), Slip Op. No. 861, PERB Case No. 06-A-02 (2007), MPD and FOP/MPD Labor Committee (on behalf of Miguel Montanez), Slip Op. No. 814, PERB Case No. 05-A-03 (2006); and MPD and FOP/MPD Labor Committee (on behalf of Angela Fisher), 51 DCR 4173, Slip Op. No. 738, PERB Case No. 02-A-07, *affirmed by Judge Kravtz of the Superior Court in Metropolitan Police Dep't v. D.C. Public Employee Relations Board*, 01-MPA-18 (September 17, 2002), *affirmed by District of Columbia Court of Appeals in Metropolitan Police Dep't v. D.C. Public Employee Relations Board*, 901 A.2d 784 (D.C. 2006).

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In addition, we have found that an arbitrator does not exceed his/her authority by exercising his equitable power. . . . unless it is expressly restricted by the parties' collective bargaining agreement.<sup>1</sup> See, District of Columbia Metropolitan Police Department and Fraternal Order of Police/MPD Labor Committee, 39 DCR 6232, Slip Op. No. 282, PERB Case No. 92-A-04 (1992).

In the present case, MPD does not cite any provision of the parties' CBA that limits the Arbitrator's equitable power. Therefore, once Arbitrator Hochhauser concluded that MPD violated Article 12, Section 6 of the parties' CBA, she also had the authority to determine the appropriate remedy. Contrary to MPD's contention, Arbitrator Hochhauser did not add to or subtract from the parties' CBA but merely used her equitable power to formulate the remedy, which in this case was rescinding the Grievant's termination. Thus, Arbitrator Hochhauser acted within her authority.

As a second basis for review, MPD claims that the Award is on its face contrary to law and public policy. (See Request at p. 2). For the reasons discussed below, we disagree.

The possibility of overturning an arbitration decision on the basis of public policy is an "extremely narrow" exception to the rule that reviewing bodies must defer to an arbitrator's ruling. "[T]he exception is designed to be narrow so as to limit potentially intrusive judicial review of arbitration awards under the guise of public policy." American Postal Workers Union, AFL-CIO v. United States Postal Service, 789 F. 2d 1, 8 (D.C. Cir. 1986). A petitioner must demonstrate that the arbitration award "compels" the violation of an explicit, well defined, public policy grounded in law and or legal precedent. See, United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc., 484 U.S. 29 (1987). Furthermore, the petitioning party has the burden to specify "applicable law and definite public policy that mandates that the Arbitrator arrive at a different result." MPD and FOP/MPD Labor Committee, 47 DCR 717, Slip Op. No. 633 at p. 2, PERB Case No. 00-A-04 (2000). Also see, District of Columbia Public Schools and American Federation of State, County and Municipal Employees, District Council 20, 34 DCR 3610, Slip Op. No. 156 at p. 6, PERB Case No. 86-A-05 (1987). As the Court of Appeals has stated, we must "not be lead astray by our own (or anyone else's) concept of 'public policy' no matter how tempting such a course might be in any particular factual setting." District of Columbia Department of Corrections v. Teamsters Union Local 246, 54 A.2d 319, 325 (D.C. 1989).

In the present case, MPD asserts that the Award is on its face contrary to law and public policy. Specifically, MPD asserts that even if a violation of the 55-day rule occurred it constituted harmless error and that consistent with a Superior Court ruling the termination should be sustained. (See Request at p. 6). In support of its position, MPD cites Judge Abrecht's decision in Metropolitan Police Department v. District of Columbia Public Employee Relations Board, 01-MPA-19 (September 10, 2002). We have previously considered and rejected this argument. In Metropolitan Police Dep't v. D.C. Public Employee Relations Board, 901 A.2d 784 (D.C. 2006), MPD appealed our determination that the "harmless error rule" was not applicable in cases such as the one currently before the Board. The District of Columbia Court of Appeals

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<sup>1</sup> We note that if MPD had cited a provision of the parties' collective bargaining agreement that limits the Arbitrator's equitable power, that limitation would be enforced.

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rejected MPD's argument that a violation of the CBA's 55-day rule was subject to the "harmless error rule" by stating the following:

The Comprehensive Merit Personnel Act (CMPA), D.C. Code § 1-617.01 *et seq.* (2001), regulates public employee labor-management relations in the District of Columbia, and, as MPD concedes, the CMPA contains no provision requiring harmful (or harmless) error analysis before reversal of erroneous agency action is permitted. Neither do PERB's rules impose such a review standard on itself or on arbitrators acting under its supervision. MPD points out that had Officer Fisher, instead of electing arbitration with the sanction of the FOP, chosen to appeal her discharge to the Office of Employee Appeals (OEA), *see* D.C. Code § 1-606.02, she would have been met with OEA's rule barring reversal of an agency action "for error . . . if the agency can demonstrate that the error was harmless," 6 DCMR § 632.4, 46

D.C. Reg. 9318-19; and MPD, again citing *Cornelius*, warns of the forum-shopping and inconsistency in decisions that could result if PERB (and arbitrators) were not held to the same standard. *See Cornelius*, 472 U.S. at 662 ("If respondents' interpretation of the harmful-error rule as applied in the arbitral context were to be sustained, an employee with a claim . . . would tend to select the forum - - the grievance and arbitration procedures - - that treats his claim more favorably. The result would be the very inconsistency and forum shopping that Congress sought to avoid."). But, as the quotation from *Cornelius* demonstrates, Congress made its intent to avoid these evils "clear" in the Civil Service Reform Act. *Id.* at 661 ("Adoption of respondents' interpretation . . . would directly contravene this clear congressional intent.") Since MPD can point to no similar expression of legislative intent here, it cannot claim a misinterpretation of law by the arbitrator that was apparent "on its face." 901 A.2d 784, 787.<sup>2</sup>

We find that MPD has not cited any specific law or public policy that was violated by the Arbitrator's Award. MPD had the burden to specify "applicable law and public policy that mandates that the Arbitrator arrive at a different result." MPD and FOP/MPD Labor Committee, 47 DCR 717, Slip Op. No. 633 at p. 2, PERB Case No. 00-A-04 (2000). In the present case, MPD failed to do so.

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<sup>2</sup>The Court of Appeals also rejected MPD's argument that the time limit imposed on the agency by Article 12, Section 6 of the parties' CBA is directory, rather than mandatory.

In view of the above, we find no merit to MPD's arguments. Also, we find that the Arbitrator's conclusions are based on a thorough analysis and cannot be said to be clearly erroneous, contrary to law or public policy, or in excess of her authority under the parties' CBA. Therefore, no statutory basis exists for setting aside the Award.

**ORDER**

**IT IS HEREBY ORDERED THAT:**

1. The Metropolitan Police Department's Arbitration Review Request is denied.
2. Pursuant to Board Rule 559.1, this Decision and Order is final upon issuance.

**BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD**  
Washington, D.C.

February 13, 2007

Government of the District of Columbia  
Public Employee Relations Board

In the Matter of:

District of Columbia  
Metropolitan Police Department,

Petitioner,

and

Fraternal Order of Police/Metropolitan  
Police Department Labor Committee  
(on behalf of John Hackley),

Respondent.

PERB Case No. 06-A-19

Opinion No. 876

**FOR PUBLICATION**

**DECISION AND ORDER**

I. Statement of the Case

The District of Columbia Metropolitan Police Department ("MPD" or "Agency") filed an Arbitration Review Request ("Request") in the above-captioned matter. The Arbitrator found that: (1) the Grievant did not waive the application of the 55-day rule and (2) MPD violated the 55-day rule contained in the parties' collective bargaining agreement ("CBA"). As a result, the Arbitrator rescinded the termination of John Hackley ("Grievant"), a bargaining unit member.

MPD contends that the: (1) Arbitrator was without authority to grant the Award; and (2) Award is contrary to law and public policy. The Fraternal Order of Police/Metropolitan Police Department Labor Committee ("FOP" or "Union") opposes the Request.

The issue before the Board is whether "the award on its face is contrary to law and public policy" or whether "the arbitrator was without or exceeded his or her jurisdiction. . . ." D.C. Code §1-605.02(6) (2001 ed).

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## II. Discussion

MPD alleged on August 12, 2003, the Medical Services Division placed the Grievant on limited duty; however, he failed to report to work until September 11, 2003. As a result, MPD alleged that the Grievant was absent without leave ("AWOL") from August 18, 2003 through September 11, 2003. Also, MPD asserted that on September 11, 2003, the Grievant made an untruthful statement to his supervisor. In view of the above, the Grievant was served with a Notice of Proposed Adverse Action on April 9, 2004. On April 13, 2004, the Grievant requested a departmental hearing (also termed a "trial board"). The departmental hearing was scheduled for June 18, 2004. However, on June 15, 2004, the Grievant's counsel requested a continuance from June 18, 2004, to July 13, 2004. Subsequently, a departmental hearing was held on July 15, 2004.

The trial board found the Grievant guilty of all charges and recommended that the Grievant be terminated. The Final Notice of Adverse Action was dated September 3, 2004. The Grievant appealed the proposed termination to the Chief of Police. The Chief of Police denied the grievance. The Grievant appealed the decision by invoking arbitration pursuant to the parties' CBA. (See Award at p. 5).

At arbitration FOP asserted that MPD violated Article 12, Section 6 of the parties' CBA in that it did not issue its decision within 55 days of the date that the Grievant filed his request for a departmental hearing. (See Award at p. 6) Article 12, Section 6 of the parties' CBA provides in pertinent part, that an employee "shall be given a written decision and the reasons therefore no later than . . . 55 days after the date the employee is notified in writing of the charges or the date the employee elects to have a departmental hearing." (Award at p. 4.). FOP argued that in this case the departmental hearing was requested on April 13, 2004 and was held on July 13, 2004. Therefore, MPD was required to provide a written decision by August 2, 2004. However, MPD did not issue its final decision ordering the Grievant's termination "until September 3, 2004, sixty-seven (67) days after the requested hearing." (Award at p. 5). FOP argued "that even excluding the period from June 18<sup>th</sup> to July 13<sup>th</sup> (i.e., the time of the requested continuance), the MPD was late in issuing the Final Notice." (Award at p. 6). FOP claimed that since MPD violated the 55-day rule the termination should be rescinded.

MPD countered that when the Grievant asked for a continuance of the hearing before the Trial Board, his continuance request resulted in a complete waiver of the 55-day time limitation in Article 12, Section 6(a) of the parties' collective bargaining agreement. (See Award at p. 6). In addition, MPD asserted that even if a violation of the 55-day rule occurred it constituted harmless error and that consistent with a Superior Court ruling the termination should be sustained. (See Award at p. 8). In support of its position, MPD cited Judge Abrecht's decision in Metropolitan Police Department v. District of Columbia Public Employee Relations Board, 01-MPA-19 (September 10, 2002).

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In an Award issued on May 19, 2006, Arbitrator Homer La Rue determined that the Grievant and the FOP did not waive application of the 55-day time limit when a continuance of the Trial Board hearing from June 18<sup>th</sup> to July 13<sup>th</sup> was requested and granted. Instead, the Grievant waived "any right to include the tolled period for purposes of calculating the time within which the Chief must issue the Department's decision." (Award at p. 7).

In addition, the Arbitrator rejected MPD's "harmless error" argument by indicating that he did not find MPD's reliance on Judge Albrecht's decision in Case No. 01-MPA-19 persuasive because it "is not in line with the U.S. Supreme Court's interpretation of the arbitrator's authority. Nor is it in line with the lower federal courts that have relied on the Supreme Court's statements as to the power of the arbitrator to fashion an appropriate remedy where there is a finding of a violation of the CBA, and there is no explicit remedy stated in the CBA." (Award at pgs. 10-11).

Next the Arbitrator focused on what would be the appropriate remedy in this case and determined that termination was not appropriate in this case. The Arbitrator found that a 60-day suspension without pay was the appropriate penalty in this case.

MPD takes issue with the Award. Specifically, MPD argues that the: (1) Arbitrator was without authority to grant the Award and (2) Award is contrary to law and public policy. (See Request at p. 2).

With respect to the waiver issue, MPD asserts that the Arbitrator's ruling that the Grievant did not waive the 55-day rule is an incorrect interpretation of Article 12, Section 6 of the parties' CBA. (See Request at p. 4).

We have held that "[b]y agreeing to submit the settlement of [a] grievance to arbitration, it [is] the Arbitrator's interpretation, not the Board's, that the parties have bargained for." University of the District of Columbia and University of the District of Columbia Faculty Association, 39 DCR 9628, Slip Op. No. 320 at p. 2, PERB Case No. 92-A-04 (1992). In addition, we have found that by submitting a matter to arbitration, "the parties agree to be bound by the Arbitrator's interpretation of the parties' agreement . . . as well as his evidentiary findings and conclusions. . ." Id. Moreover, "[this] Board will not substitute its own interpretation or that of the Agency for that of the duly designated arbitrator." District of Columbia Department of Corrections and International Brotherhood of Teamsters, Local Union 246, 34 DCR 3616, Slip Op. No. 157 at p. 3, PERB Case No. 87-A-02 (1987). In the present case, the parties submitted their dispute to Arbitrator La Rue. Neither MPD's disagreement with the Arbitrator's interpretation of Article 12, Section 6, nor MPD's disagreement with the Arbitrator's findings and conclusions, are grounds for reversing the Arbitrator's Award. See, MPD and FOP/MPD Labor Committee (on behalf of Keith Lynn), Slip Op. No 845, PERB Case No. 05-A-01 (2006).

MPD asserts that the Arbitrator was presented with two decisions of the District of Columbia Superior Court regarding a remedy for violations of the CBA's fifteen-day rule and fifty-five day rule. In both instances the cases were before the Superior Court on review of arbitration decisions that reversed the discipline imposed by MPD due to missed contractual time

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limits. In Metropolitan Police Dep't v. D.C. Public Employee Relations Board, 01-MPA-19 (September 10, 2002), Judge Abrecht reversed the decision of the arbitrator. In the other case, Metropolitan Police Dep't v. D.C. Public Employee Relations Board, 01-MPA-18 (September 17, 2002), Judge Kravitz upheld the decision of the arbitrator. MPD argues that in the present case, "the Arbitrator was guided by Judge Kravitz's decision and, therefore, concluded that he had the authority to fashion a remedy for the failure of [MPD] to comply with the 55-day rule. [MPD asserts] that the decision of the Arbitrator was contrary to law and public policy and was not based upon any authority set forth in the CBA." (Request at p. 5). MPD submits "that the decision of Judge Abrecht should have been followed by the Arbitrator [and not that of Judge Kravitz.]" (Request at p. 7).

In addition, MPD contends that "[t]he failure to comply with the fifty-five day period was harmless in that [the] Grievant was not denied any due process protections. Moreover, Grievant was not prejudiced by the delay because during the period beyond the 55-days he was in a pay status." (Request at pgs. 7-8). Also, MPD argues that "resolution of this matter should be controlled by *Fraternal Order of Police/Metropolitan Police Department Labor Committee and D.C. Metropolitan Police Department*, Case No. 50620-656821-A (March 14, 2006), where Arbitrator Joan Parker observed that it would be inappropriate to rescind a termination based upon a 55-day rule violation and stressed instead that the 'appropriate remedy for such a violation would be back pay for any pay [g]rievant lost as a result of the delay. . . ." (Request at p. 8).

MPD notes that the Grievant committed serious acts of misconduct. "If Grievant is reinstated, the nature of his misdeeds makes it unlikely that he would be returned to a full-duty status. Under the circumstances, a remedy of reinstatement would violate the public policy in that [the] Grievant would be unable to provide the services to the public as set forth in D.C. Official Code 2001 Edition. . . ." (Request at p. 8). Also, MPD claims that "[i]t is beyond question that the suitability of a person employed as a police officer is an important public policy [and MPD] has determined that Grievant is unfit to be a police officer." (Request at p. 8). Finally, MPD asserts that a remedy of reinstatement returns to MPD an individual "unsuitable to serve as a police officer. Clearly such a remedy would violate public policy." (Request at p. 8).

MPD's arguments are a repetition of the positions it presented to the Arbitrator and its ground for review only involves a disagreement with the arbitrator's interpretation of Article 12, Section 6 of the parties' CBA. MPD merely requests that we adopt its interpretation and remedy for its violation of the above-referenced provision of the CBA. This we will not do.

MPD suggests that the plain language of Article 12, Section 6 of the parties' CBA does not impose a penalty for noncompliance with the 55-day rule. Therefore, by imposing a penalty where none was expressly stated or intended, MPD asserts that the Arbitrator added to and modified the parties' CBA. (See, Request at pgs. 5-6).

In cases involving the same parties, we have previously considered the question of whether an arbitrator exceeds his authority when he rescinds a Grievant's termination for MPD's violation of Article 12, Section 6 of the parties' CBA. In those cases we rejected the same

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argument being made in the instant case and held that the Arbitrator was within his authority to rescind a Grievant's termination to remedy MPD's violation of the 55-day rule. (See MPD and FOP/MPD Labor Committee (on behalf of Jay Hang), Slip Op. No. 861, PERB Case No. 06-A-02 (2007); MPD and FOP/MPD Labor Committee (on behalf of Miguel Montanez), Slip Op. No. 814, PERB Case No. 05-A-03 (2006); and MPD and FOP/MPD Labor Committee (on behalf of Angela Fisher), Slip Op. No. 738, PERB Case 02-A-07, *affirmed by Judge Kravtz of the Superior Court in Metropolitan Police Dep't v. D.C. Public Employee Relations Board*, 01-MPA-18 (September 17, 2002), *affirmed by District of Columbia Court of Appeals in Metropolitan Police Dep't v. D.C. Public Employee Relations Board*, 901 A.2d 784 (D.C. 2006). In addition, we have found that an arbitrator does not exceed his authority by exercising his equitable power, unless it is expressly restricted by the parties' collective bargaining agreement.<sup>1</sup> See, District of Columbia Metropolitan Police Department and Fraternal Order of Police/MPD Labor Committee, 39 DCR 6232, Slip Op. No. 282, PERB Case No. 92-A-04 (1992).

In the present case, MPD does not cite any provision of the parties' CBA that limits the Arbitrator's equitable power. Therefore, once the Arbitrator concluded that MPD violated Article 12, Section 6 of the parties' CBA, he also had the authority to determine the appropriate remedy. Contrary to MPD's contention, Arbitrator La Rue did not add to or subtract from the parties' CBA but merely used his equitable power to formulate the remedy, which in this case was rescinding the Grievant's termination. Thus, Arbitrator La Rue acted within his authority.

As a second basis for review, MPD claims that the Award is on its face contrary to law and public policy. (Request at p. 2). For the reasons discussed below, we disagree.

The possibility of overturning an arbitration decision on the basis of public policy is an "extremely narrow" exception to the rule that reviewing bodies must defer to an arbitrator's ruling. "[T]he exception is designed to be narrow so as to limit potentially intrusive judicial review of arbitration awards under the guise of public policy." American Postal Workers Union, AFL-CIO v. United States Postal Service, 789 F.2d 1, 8 (D.C. Cir. 1986). A petitioner must demonstrate that the arbitration award "compels" the violation of an explicit, well defined, public policy grounded in law and or legal precedent. See, United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc., 484 U.S. 29 (1987). Furthermore, the petitioning party has the burden to specify "applicable law and definite public policy that mandates that the Arbitrator arrive at a different result." MPD and FOP/MPD Labor Committee, 47 DCR 717, Slip Op. No. 633 at p. 2, PERB Case No. 00-A-04 (2000). Also see, District of Columbia Public Schools and American Federation of State, County and Municipal Employees, District Council 20, 34 DCR 3610, Slip Op. No. 156 at p. 6, PERB Case No. 86-A-05 (1987). As the Court of Appeals has stated, we must "not be lead astray by our own (or anyone else's) concept of 'public policy' no matter how tempting such a course might be in any particular factual setting." District of Columbia Department of Corrections v. Teamster Union Local 246, 54 A2d 319, 325 (D.C. 1989).

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<sup>1</sup> We note that if MPD had cited a provision of the parties' collective bargaining agreement that limits the Arbitrator's equitable power, that limitation would be enforced.

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MPD suggests that the award violates the "harmless error" rule found in the Civil Service Reform Act, 5 U.S.C. §7701(c)(2)(A) and is not consistent with the Supreme Court's opinion in

Cornelius v. Nutt, 472 S.S. 648 (1985). We have previously considered and rejected this argument. In Metropolitan Police Dep't v. D.C. Public Employee Relations Board, 901 A.2d 784 (D.C. 2006) MPD appealed our determination that the "harmless error rule" was not applicable in cases such as the one currently before the Board. The District of Columbia Court of Appeals rejected MPD's argument that a violation of the CBA's 55-day rule was subject to the "harmless error" rule by stating the following:

The Comprehensive Merit Personnel Act (CMPA), D.C. Code § 1-617.01 *et seq.* (2001), regulates public employee labor-management relations in the District of Columbia, and, as MPD concedes, the CMPA contains no provision requiring harmful (or harmless) error analysis before reversal of erroneous agency action is permitted. Neither do PERB's rules impose such a review standard on itself or on arbitrators acting under its supervision. MPD points out that had Officer Fisher, instead of electing arbitration with the sanction of the FOP, chosen to appeal her discharge to the Office of Employee Appeals (OEA), *see* D.C. Code § 1-606.02, she would have been met with OEA's rule barring reversal of an agency action "for error . . . if the agency can demonstrate that the error was harmless," 6 DCMR § 632.4, 46 D.C. Reg. 9318-19; and MPD, again citing *Cornelius*, warns of the forum-shopping and inconsistency in decisions that could result if PERB (and arbitrators) were not held to the same standard. *See Cornelius*, 472 U.S. at 662 ("If respondents' interpretation of the harmful-error rule as applied in the arbitral context were to be sustained, an employee with a claim . . . would tend to select the forum - - the grievance and arbitration procedures - - that treats his claim more favorably. The result would be the very inconsistency and forum shopping that Congress sought to avoid."). But, as the quotation from *Cornelius* demonstrates, Congress made its intent to avoid these evils "clear" in the Civil Service Reform Act. *Id.* at 661 ("Adoption of respondents' interpretation . . . would directly contravene this clear congressional intent.") Since MPD can point to no similar expression of legislative intent here, it cannot claim a misinterpretation of law by the arbitrator that was apparent "on its face." 901 A.2d 784, 787.<sup>2</sup>

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<sup>2</sup>The Court of Appeals also rejected MPD's argument that the time limit imposed on the agency by Article 12, Section 6 of the CBA is directory, rather than mandatory.

We find that MPD has not cited any specific law or public policy that was violated by the Arbitrator's Award. MPD had the burden to specify "applicable law and public policy that mandates that the Arbitrator arrive at a different result." MPD and FOP/MPD Labor Committee, 47 DCR 717, Slip Op. No. 633 at p. 2, PERB Case No. 00-A-04 (2000). In the present case, MPD failed to do so.

In view of the above, we find no merit to MPD's arguments. Also, we find that the Arbitrator's conclusions are based on a thorough analysis and cannot be said to be clearly erroneous, contrary to law or public policy, or in excess of his authority under the parties' collective bargaining agreement. Therefore, no statutory basis exists for setting aside the Award.

**ORDER**

**IT IS HEREBY ORDERED THAT:**

1. The Metropolitan Police Department's Arbitration Review Request is denied.
2. Pursuant to Board Rule 559.1, this Decision and Order is final upon issuance.

**BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD**  
Washington, D.C.

February 27, 2007

**Government of the District of Columbia  
Public Employee Relations Board**

In the Matter of:

American Federation of Government Employees,  
Local 631,<sup>1</sup>

Petitioner,

and

District of Columbia Water and Sewer Authority,

Respondent.

PERB Case No. 05-N-02

Opinion No. 877 (see also #811)

**FOR PUBLICATION**

**DECISION AND ORDER ON NEGOTIABILITY APPEAL**

**I. Statement of the Case**

On July 23, 2005, the American Federation of Government Employees, Local 631 ("Petitioner" or "Union") filed a Negotiability Appeal ("Appeal") in the above-captioned matter.

<sup>1</sup>On December 15, 2005 the American Federation of Government Employees, Local 631 ("AFGE, Local 631") submitted a document styled "Brief of the Unions in Support of the Negotiability Appeal". In the December 15<sup>th</sup> submission, the Petitioner stated that "[t]he original petition, erroneously, listed only the American Federation of Government Employees, Local 631 [and requested that] the [caption] in this matter be corrected to include American Federation of Government Employees, Local 2553 and the National Association of Government Employees, AFL-CIO, Local R3-06, which were parties to the negotiations." However, when the Appeal was originally considered by the Board, it only referred to the American Federation of Government Employees, AFL-CIO, Local 631 as the Petitioner. The Board considered the Appeal and determined that it could not reach a decision based on the pleadings that were submitted. Therefore, we ordered the parties to submit briefs in this matter. See Decision and Order ("D&O") in Slip Op. No. 811, PERB Case No. 05-N-02 (December 1, 2005). As a result, the Board's D&O in Slip Op. No. 811 only concerned AFGE, Local 631. Thus, the Board had already acted with regard to the sole Petitioner in Slip Op. No. 811, when the Petitioner made the request to amend the caption in this matter. In addition, WASA's brief indicated that AFGE, Local 631 was the sole Petitioner. In view of the foregoing facts and because the other Unions will not be prejudiced by the Board's denial, we deny the Union's request to amend.

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WASA ("WASA" or "Respondent") and the Petitioner entered into a collective bargaining agreement effective October 4, 2001. The parties have been engaged in negotiations for a successor agreement. The Petitioner claims that it submitted a proposal (Article 23) concerning job descriptions to the Respondent. The Respondent asserted in its Response to the Negotiability Appeal ("Response") that the proposal was nonnegotiable. The Petitioner filed the Appeal in this case asking the Board to declare Article 23 in its entirety to be negotiable.

## II. Background

On July 23, 2005, the Union filed a Negotiability Appeal in the above-captioned matter. In its submission, the Union did not state why it believes the proposal is negotiable. Therefore, by Decision and Order (D&O) in Slip Op. No. 811, PERB Case No. 05-N-02, dated December 1, 2005 (Corrected Copy), the Board requested that the parties submit briefs in this matter. The parties complied with the D&O in a timely manner.

## III. Position of the Parties

### The Agency's Position Regarding the 2005 Amendment to the CMPA found at D.C. Code § 1-617.08(a-1)

WASA claims that "the Union's proposal would place an improper restraint on WASA's management rights" under the Comprehensive Merit Personnel Act ("CMPA"). (Response at p. 2). WASA notes that the Board has held that "[w]here a proposal infringes upon an agency's management rights, the Board has shown it will reject a negotiability appeal." Citing *American Federal of Government Employees, Local 3721 and D.C. Fire and Emergency Medical Services Department*, Slip Op. No. 390, PERB Case No. 94-N-04 (1999). (Response at p. 3). WASA further contends that "[p]roposals that involve a management right are permissive subjects of bargaining, except as to the impact and effect of such rights. Citing *International Brotherhood of Teamsters, Local 446 v. D.C. General Hospital*, 39 D.C. Reg. 9633, Slip Op. No. 322, PERB Case No. 91-U-14 (1994).

WASA cites Board case law stating that where the Board found that a proposal contained a limitation of management's right to assign duties, the proposal was found to be nonnegotiable.<sup>2</sup> (Response at p. 4). Further, WASA maintains that it has the right to alter the job duties of positions

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<sup>2</sup>See *Teamsters Local No. 639 v. D.C. Public Schools*, Slip Op. No. 263 (1991), PERB Case Nos. 90-N-02, 90-N-03, 90-N-04 (1990); *International Brotherhood of Police Officers, Local 446 v. D.C. General Hospital*, Slip Op. No. 336, PERB Case No. 92-N-05 (1992); and *National Association of Government Employees v. D.C. Water and Sewer Authority*, 47 DCR 7551, Slip Op. No. 635, 99-U-04 (2000).

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and to assign employees within the agency. Therefore, WASA claims that the Union's proposal to limit such rights is nonnegotiable.<sup>3</sup> WASA asserts that D.C. Code § 1-617.08(a)(5) gives management the absolute right to determine, among other things, the assignment of work and types and grades of positions.

Relying on the recent amendment to the CMPA found at D. C. Code § 1-617.08(a-1), WASA contends that management cannot waive its management rights through any action, exercise or agreement. Thus, WASA argues that "the Union may not attempt to justify [its] proposal by referring to the [current provisions of] Article 23 in the parties' previous[ly] [negotiated] contract." (Response at p. 6).

The Union's Position Regarding the 2005 Amendment to the CMPA found at D.C.  
Code § 1-617.08(a-1)

In its brief, the Union relies on D.C. Code § 1-617.08(b), which states that "All matters shall be deemed negotiable except those that are proscribed by this subchapter. Negotiations concerning compensation are authorized to the extent provided in § 1-617.16." (emphasis added). Therefore, the Union argues that all subjects except those specifically enumerated in D.C. Code § 1-617.08(a) are negotiable. The Union asserts that its proposal is entitled to a presumption of negotiability.<sup>4</sup> (See Petitioners' Brief at p. 3).

In addition, the Union cites *University of the District of Columbia Faculty Association and the University of the District of Columbia*, 29 DCR 2975, Slip Op. No. 43 at p. 3, PERB Case No. 82-N-01 (1982), where the Board held that when there is a close question or the statute is unclear, it is relevant that the parties have previously bargained on a subject. The Union claims that the current collective bargaining agreement shows that the parties have previously bargained on the following issues: (1) supplying employees and the Union with job descriptions (current proposal at Section A.1) (2) the definition of "other duties as assigned;" (current proposal at Section A.2; and (3) a process of review when an employee is dissatisfied with his or her job description (current proposal at Section F).

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<sup>3</sup>*International Association of Police Officers, Local 446 and D.C. General Hospital*, 42 DCR 5482, Slip Op. No. 336 at p. 2, PERB Case No. 92-N-05 (1992); where the Board found that a proposal making light duty work available for officers was nonnegotiable to the extent it would have limited management's right to assign employees. (Response at p. 4) See also, *American Federation of Government Employees, Local 383 v. D.C. Department of Human Services*, 49 DCR 770, Slip Op. No. 418, PERB Case No. 94-U-09 (1995).

<sup>4</sup>Citing *Washington Teachers Union, Local 6, AFT and District of Columbia Public Schools*, 46 DCR. 8087, Slip Op. No. 450, PERB Case No. 95-N-01 (1992).

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The Union contends that the amendment found at D.C. Code § 1-617.08 (a-1) (Supp. 2005) does not change or expand the management rights defined in the statute. The Union asserts that this language merely clarifies that management's actions cannot be deemed to waive any rights set forth in the statute. Finally, the Union concludes that WASA misinterprets D.C. Code § 1-617.08 (a)(5)(B) when it states in its Response that this statutory provision means that management has the sole right to determine the assignment of work and the types and grades of positions.

**IV. Discussion Concerning the 2005 Amendment to the CMPA found at D.C. Code § 1-617.08(a-1)**

This case represents one of the first negotiability appeals considered by the Board after the April 2005 amendment to the CMPA found at D.C. Code § 1-617.08(a-1) (Supp. 2005). Therefore, it is appropriate to review our prior holdings under the CMPA and consider what impact, if any, the 2005 amendment has on the instant appeal.

When considering a negotiability appeal, the Board has adopted certain principles concerning: (1) mandatory, (2) permissive; and (3) illegal subjects of bargaining. In *University of the District of Columbia Faculty Association/NEA and University of the District of Columbia*, 29 DCR 2975, 29 DCR 2975, Slip Op. No. 43 at p. 3, PERB Case No. 82-N-01 (1982), the Board stated as follows:

It is a critical question in collective bargaining whether particular contract proposals are to be considered (i) mandatory, (ii) permissive, or (iii) illegal subjects of bargaining. The U.S. Supreme Court established and defined in *National Labor Relations Board v. Borg-Warner Corp.*, 356 U.S. 342 (1975), these three categories of bargaining subjects as follows: mandatory subjects over which the parties must bargain; permissive subjects over which the parties may bargain; and illegal subjects over which the parties may not legally bargain. The court held further that mandatory subjects are those which are determined to be within the scope of wages, hours and terms and conditions of employment and that the parties may bargain on these subjects to the point of impasse. Bargaining on permissive subjects, however, was held to be discretionary and neither party is required to negotiate in good faith to agreement or impasse. . . ."

The CMPA at D.C. Code § 1-617.08(a) (2001), defines management rights as follows:

(a) The respective personnel authorities (management) shall retain the sole right, in accordance with applicable laws and rules and regulations:

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- (1) To direct employees of the agencies;
- (2) To hire, promote, transfer, assign, and retain employees in positions within the agency and to suspend, demote, discharge, or take other disciplinary action against employees for cause;
- (3) To relieve employees of duties because of lack of work or other legitimate reasons;
- (4) To maintain the efficiency of the District government operations entrusted to them;
- (5) To determine:
  - (A) The mission of the agency, its budget, its organization, the number of employees,
  - (B) The number, types, and grades of positions of employees assigned to an agency's organizational unit, work project, or tour of duty;
  - (C) The technology of performing the agency's work; and
  - (D) The agency's internal security practices; and
- (6) To take whatever actions may be necessary to carry out the mission of the District government in emergency situations.

Regarding the issue of negotiability, D.C. Code § 1-617.08(b) provides in pertinent part as follows:

- (b) All matters shall be deemed negotiable except those that are proscribed by this subchapter. . . .

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The Board has previously noted that there is nothing in the statute that specifically proscribes or prohibits bargaining over the management rights listed in D.C. Code § 1-617.08(a) (2001) stating as follows:

D.C. Code § 1-61[7].08(b), which provides that “[a]ll matters shall be deemed negotiable except those that are proscribed by this subchapter”, establishes a presumption of negotiability.<sup>5</sup> While [the Board] start[s] with this presumption, we have stated that in view of specific rights reserved solely to management under this same provision, i.e., D.C. Code § 1-617.08(a), ‘the Board must be careful in assessing proffered broad interpretations of either subsection (a) or (b)’.<sup>6</sup> Notwithstanding the rights reserved to management, a limited right to bargain nevertheless exists with respect to matters concerning the exercise of management rights, i.e., its impact and effect on terms and conditions of employment, and procedures concerning how these right are implemented.<sup>7</sup> (Citation omitted) We are mindful of these competing statutory rights and interests as we consider the negotiability of the proposals that are the subject of this appeal.” (emphasis added) *Washington Teachers’ Union and District of Columbia Public Schools*, 46 DCR 8090, Slip Op. No 450 at p. 4, PERB Case No. 95-N-01 (1995).

Further, this Board has acknowledged that by electing to bargain over the management rights listed in the statute, management was making these subjects *permissive* subjects of bargaining. See *University of the District of Columbia Faculty Association/NEA and University of the District of Columbia*, 29 DCR 2975, Slip Op. No. 43 at p. 3, PERB Case No. 82-N-01 (1982).

When bargaining over a successor agreement in cases where management had previously bargained over a management right, labor organizations have argued that a matter which is designated a management right was rendered negotiable because the parties had previously bargained over it. We have consistently rejected this argument and found that although the parties had previously bargained over a management right, the management right reverted back to management after the

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<sup>5</sup>*International Association of Firefighters, Local 36 and D.C. Fire Department*, 35 DCR 118, Slip Op. No. 167, PERB Case No. 87-N-01 (1988).

<sup>6</sup>*Teamsters Local Union. No. 639, supra*, Slip Op. No. 263, at 2-3.

<sup>7</sup>*Id.*

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collective bargaining agreement expired.<sup>8</sup> Nonetheless, in *Washington Teachers' Union and District of Columbia Public Schools*, 46 DCR 8090, Slip Op. No. 450 at p. 8, PERB Case No. 95-N-01 (1995) and *International Brotherhood of Police Officers, Local No. 445, AFL-CIO v. District of Columbia Department of Administrative Services*, 43 DCR 1484, Slip Op. No. 401 n.3, PERB Case No. 94-U-13 (1994), we also held that when "there is a close question of whether or not a particular matter is a proper subject of bargaining, 'it becomes relevant that the parties have on previous occasion either accepted or rejected negotiation overtures'."<sup>9</sup> However, the new amendment to the CMPA impacts on this finding.

On April 13, 2005, the CMPA was amended at D.C. Code § 1-617.08(a-1) (Supp. 2005). Subsection (a-1) provides as follows:

*(a-1) An act, exercise, or agreement of the respective personnel authorities (management) shall not be interpreted in any manner as a waiver of the sole management rights contained in subsection (a) of this section. (emphasis added).*

The Board will now consider the impact of the 2005 Amendment. The Board notes that at first glance, the above amendment could be interpreted to mean that the management rights found in D.C. Code § 1-617.08(a) may no longer be a subject of permissive bargaining. However, it could also be interpreted to mean that the rights found in § 1-617.08(a) may be subject to permissive bargaining, if such bargaining is not considered as a permanent waiver of that management right or any other management right. As a result, we believe that the language contained in the statute is ambiguous and unclear. Therefore, in order to determine the intent of the City Council, the Board

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<sup>8</sup>See *Washington Teachers' Union and District of Columbia Public Schools*, 46 DCR 8090, Slip Op. No. 450 at p. 4, PERB Case No. 95-N-01 (1995).

<sup>9</sup>See also, *University of the District of Columbia Faculty Association/NEA and University of the District of Columbia*, 29 DCR 2975, 2977, Slip Op. No. 43 at 3, PERB Case No. 82-N-01 (1982), where the Board found that "where there is a close question regarding a particular issue and the statutory dictate is unclear, it becomes relevant that the parties have on previous occasion either accepted or rejected negotiation overtures". Therefore, in that case, the Board looked at the prior bargaining history of the parties. Also, in *IBPO, Local 445 and D.C. Dept. of Administrative Services*, 43 DCR 1484, Slip Op. No. 401 at p. 3, PERB Case No. 94-U-13 (1994), the Board stated at page 3 that "when there is a close question of whether or not a particular matter is a proper subject of bargaining, 'it becomes relevant that the parties have on previous occasion either accepted or rejected negotiation overtures'." Citing *University of the District of Columbia Faculty Association/NEA and University of the District of Columbia*, 29 DCR 2975, 2977, Slip Op. No. 43 at p. 3, PERB Case No. 82-N-01 (1982); and *International Association of Firefighters, Local 6 and D.C. Fire Department*, 35 DCR 118, Slip Op. 167, PERB Case No. 87-N-01 (1988).

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reviewed the legislative history of the 2005 amendment.

The section-by-section analysis prepared by the Subcommittee on Public Interest, chaired by Councilmember Mendelson, states as follows:

Section 2(b) also protects management rights generally by providing that no "act, exercise, or agreement" by management will constitute a more general waiver of a management right. *This new paragraph should not be construed as enabling management to repudiate any agreement it has, or chooses, to make. Rather, this paragraph recognizes that a right could be negotiated. However, if management chooses not to reserve a right when bargaining, that should not be construed as a waiver of all rights, or of any particular right at some other point when bargaining.* (emphasis added).

In view of the above, the Board makes the following observations regarding management rights under the 2005 amendment:

- (1) if management has waived a management right in the *past* (by bargaining over that right) this does not mean that it has waived that right (or any other management right) in any subsequent negotiations;
- (2) management may not repudiate any previous agreement concerning management rights during the term of the agreement;
- (3) nothing in the statute prevents management from bargaining over management rights listed in the statute if it so chooses; and
- (4) if management waives a management right *currently* by bargaining over it, this does not mean that it has waived that right (or any other management right) in future negotiations.

The Board finds that D.C. Code § 1-617.08(a-1) (Supp. 2005), as clarified by the legislative history, does nothing more than codify the Board's prior holdings with respect to management rights being permissive subjects of bargaining.

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However, under D.C. Code § 1-617.08(a-1) (Supp. 2005), the Board may no longer rely on the bargaining history of the parties in determining the negotiability of an issue "when there is a close question of whether or not a particular matter is a proper subject of bargaining." (See n. 11, above). This is based on the fact that the 2005 amendment provides that "an act, exercise or agreement of the respective personnel authorities (management) shall not be interpreted in any manner as a waiver of the sole management rights contained in subsection (a) of this section." D.C. Code § 1-617.08(a-1) (Supp. 2005).

**V. Summary of Challenged Portions of Article 23:**

Article 23 consists of Sections A through F. WASA did not raise any argument regarding subsections B and C of the Union's proposal.

Sections A, D, E and F of the Union's Article 23 proposal are at issue. The Union's proposals which the Respondent contends are nonnegotiable are set forth below, followed by the positions of the parties and the Board's ruling.

**Section A.1:**

A.1 Each employee covered by this Agreement shall be supplied with a copy of his/her job description. Employees are entitled to accurate job descriptions. The Local Unions shall be supplied with a copy of each job description upon request. The Local Unions shall be given the opportunity to review A and bargain over changes in job descriptions prior to implementation.

**WASA:** WASA asserts that Section A.1 is nonnegotiable because it would impermissibly require WASA to bargain over any changes in job descriptions or job duties. WASA maintains that "the CMPA on its face grants to WASA the management right to assign work to employees and assign employees." (Response at p. 5) Furthermore, WASA argues that "the Union may not attempt to justify its proposal by referring to the old Article 23 in the parties' previous contract." (Response at p. 6).

**Union:** The Union states that a petitioner in a negotiability appeal is entitled to a presumption that the proposal is negotiable. The Union contends that this proposal merely requests a copy of the job description. The parties have previously bargained on the issue of *supplying employees and the Union with job descriptions*. Further, the Union asserts that the proposal in Section A.1 does not infringe on WASA's right to determine the number, types and grades of positions assigned to WASA's organizational units, nor does it infringe on WASA's right to hire, promote, assign, or retain employees. (Union's Brief at p. 4). In addition, the Union argues that "bargaining over *changes* [to

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a position description], does not restrain management['s] right to establish the positions. Under the CMPA, compensation is negotiable.” (Union’s Brief at p. 5).

**Board:** The Board finds that the proposal in Section A.1 is **nonnegotiable**. The Union’s assertion that the above proposal is negotiable because it involves the duty to bargain over compensation does not properly characterize the language of the proposal. There is nothing in the proposal concerning compensation bargaining. Therefore, this argument has no merit.

The Board has held that the establishment of qualifications for a *new* position is nonnegotiable as a management right because it is an integral part of management’s decision as to how it will utilize its employees to perform its work. See *National Association of Government Employees, Local R3-06 v. D.C. Water and Sewer Authority*, 47 DCR 7551, Slip Op. No. 635 at p. 6, PERB Case No. 99-U-04 (2000) (where WASA’s Chief Financial Officer implemented a reorganization of his office and the Board adopted the Hearing Examiner’s finding that he need not bargain over the qualifications for the new positions). However, the Board has not previously addressed the issue of whether making changes to a job description is negotiable.

We note that “job descriptions” are not specifically listed as a management right under the CMPA. However, in the CMPA, management rights include among other things the right to: (1) direct employees within the agency; (2) assign employees within the agency; and (3) determine the number, types and grades of positions of employees; (4) determine the technology of performing its work; and (5) establish its internal security practices. In order to determine whether a proposal requiring bargaining over “changes in job descriptions” is negotiable, we must consider whether the proposal infringes on any of these statutory rights.

We see no difference between bargaining over the establishment of qualifications for a new position and bargaining before changing an existing position. Both cases represent a restriction on management’s right to assign work by requiring management to bargain prior to implementing any change in the duties that are assigned to an employee. This renders the proposal nonnegotiable.

#### **Section A.2:**

A.2 The phrase “other duties as assigned” shall not be used to regularly assign work to an Employee that is not reasonably related to his/her position description. Work assignments shall normally reflect the grade level, classification, and performance required of an Employee. Higher level duties and responsibilities, as documented in an established position description, may not be assigned to an Employee on a continuing basis if not assigned in accordance with merit principles.

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**WASA:** WASA claims Section A.2 is non-negotiable because it would impermissibly limit WASA's ability to assign duties and responsibilities to its employees. In support of this position, WASA cites *International Brotherhood of Police Officers and D.C. General Hospital*, 42 DCR 5482, Slip Op. No. 336, PERB Case No. 92-N-05 (1992); *AFGE v. D.C. Department of Human Services*, Slip Op. No. 418, *supra*; and *Teamsters Local No. 639 and D.C. Public Schools*, Slip Op. No. 263 *supra*. (Response at p. 4). Furthermore, WASA argues that "the Union may not attempt to justify its proposal by referring to the old Article 23 in the parties' previous contract." (Response at p. 6).

**Union:** The Union asserts that the parties have previously bargained over the definition of "other duties as assigned." The Union claims that Section A.2 does not impact on management's right to assign work to employees. Rather, it defines the manner in which the phrase "other duties as assigned" will be interpreted by the parties and the procedure to be used in assigning higher graded duties to employees. The Union maintains that proposals concerning the procedures by which management implements its decisions are negotiable. Citing *University of the District of Columbia Faculty Association/NEA and University of the District of Columbia*, 29 D.C. Reg. 2975, Slip Op. No. 43 at p. 2, PERB Case No. 82-N-01 (1982).

**Board:** The Board finds that Section A.2 is nonnegotiable. The proposal violates management's right to assign work by precluding the Agency from requiring employees to perform certain duties. Furthermore, the phrase "may not be assigned to an Employee on a continuing basis if not assigned in accordance with merit principles" is vague and undefined. Regarding the Union's argument that this issue was previously negotiated, pursuant to D.C. Code § 1-617.08(a-1) (Supp. 2005), "an act, exercise or agreement of the respective personnel authorities (management) shall not be interpreted in any manner as a waiver of the sole management rights contained in subsection (a) of this section".

#### **Section D.1:**

D.1 If the classification of a position results in a reduction in grade or pay to the employee, the employee shall be allowed to contest the action by filing a Step 3 general grievance.

**WASA:** WASA asserts that Section D.1 would impermissibly allow an employee to submit to grievance, and ultimately to a decision by a third-party arbitrator, any attempt by WASA to exercise its management rights to alter the duties, grades or classifications of job positions. WASA claims that it has the management right to determine the grades of positions under the plain language of D.C. Code § 1-617.08(a)(5). (Response at p. 5).

**Union:** The Union contends that Section D.1 provides employees with procedural rights concerning position descriptions. Section D.1 specifically provides an employee the right to contest

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a reduction in grade or pay. The Union argues that "consistent with *University of District of Columbia Faculty Association, supra*" proposals on procedural rights which do not restrain management's decisions are negotiable. (Union's Brief at pgs. 3, 5-6).

**Board:** The Board finds that Section D.1 of the Unions' proposal is negotiable. The Union has the right to contest an action that adversely impacts an employee's salary. This right must be weighed against management's statutory right under D.C. Code § 1-617.08(a)(5)(B) to determine the grades of positions. We have previously held that a proposal allowing for the *adjudication of disputes* regarding classifications or reclassification contained in position descriptions under the parties' negotiated grievance and arbitration procedure - did not seek to negotiate the grade of the position.<sup>10</sup> Furthermore, we held that because "[t]he plain meaning of the proposal [did] not attempt to establish, develop or evaluate employees' job 'classification system,'" the proposal was negotiable. *Id.* Here, we find that the plain meaning of the proposal is to establish a procedure addressing an employee's loss of pay and does not attempt to establish, develop or evaluate the employee job classification system, nor to negotiate the grade of the position.

**Section E.1:**

- E.1 The Human Resources Department shall provide the affected Local Union with advanced (sic) written notice of five (5) workdays of the Authority's decision to change, evaluate, reclassify, or create a new job description. The notice shall be given to the Union within five (5) workdays of the Authority's decision to change, evaluate, reclassify, or create a new a (sic) job description. The notice shall identify the proposed changes with a copy of the existing job description and proposed new job descriptions. The affected Union shall have the opportunity to bargain over the changes to the job description, job classification or evaluation process, prior to implementation.

**WASA:** WASA argues that Section E.1 would impermissibly require WASA to surrender its management rights by bargaining over any changes to job descriptions or job classifications. WASA maintains that "the CMPA on its face grants right to WASA the management right to assign work to employees and assign employees" to positions within the agency. (Response at p. 5).

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<sup>10</sup>*District of Columbia Public Schools and Teamsters, Local Unions No. 639 and 730, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America AFL-CIO*, 38 D.C. Code 2483, Slip Op. No. 273 at p. 11, PERB Case No. 91-N-01 (1991).

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**Union:** The Union argues that Section E.1 addresses *procedures* by which to challenge the changes in an employee's job description, job classification and evaluation process and E.2 allows for a challenge to an employee's grade and/or pay. The Union takes the position that because management must bargain over economic issues and all of these factors affect an employee's grade or pay, management must bargain concerning the above language.

**Board:** Section E.1 is **nonnegotiable**. Management has the statutory right under D.C. Code § 1-617.08(a)(2) to assign work to its employees. The last sentence in Section E.1 grants the Union the "opportunity to bargain over changes to the job description, job classification or evaluation process, *prior* to implementation", thus requiring management to bargain before it assigns work to an employee. This is a restriction on management's right to assign work.

**Section E.2:**

E.2 The Union shall be allowed to bargain over grade and pay of newly created position (job descriptions) or reclassified job descriptions that add additional requirements, duties and responsibilities.

**WASA:** WASA argues that Section E.2 would impermissibly require WASA to surrender its management rights and bargain over the grade of any newly created position or "reclassified" job description that includes any new requirements, duties or responsibilities. WASA contends that it has the management right to determine the grades of positions under the plain language of D.C. Code § 1-617.08(a)(5). (Response at p. 5).

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**Union:** The Union counters that Section E.2 allows for a challenge to an employee's grade and/or pay. The Union takes the position that because management must bargain over economic issues and all of these factors affect an employee's grade or pay, management must bargain concerning the above language.

**Board:** Section E.2 is **nonnegotiable**. The Union has the right to bargain over the salary of employees. However, management has the right to determine the *grade* of a position pursuant to D.C. Code § 1-617.08(a). Therefore, language requiring management to bargain over grades interferes with this right and renders this proposal nonnegotiable. The Union's right to bargain over salary and pay scales is preserved in the arena of compensation bargaining and is not compromised by this determination.

**Section F:**

F. Employees are free to grievance (sic) the grade and/or classification of their positions at any time without fear of reprisal or prejudice.

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**WASA:** WASA asserts that Section F would impermissibly require WASA to surrender its management rights and allow arbitrators to ultimately review and decide the appropriate grade and/or classification of any job position at any time.

**Union:** The Union asserts that the current collective bargaining agreement shows that the parties have previously bargained over a process of review when an employee is dissatisfied with his or her job description. The Union contends that Section F provides employees and the Union with procedural rights concerning position descriptions. Section F allows an employee to grieve his grade and/or classification. The Union argues that consistent with *University of District of Columbia Faculty Association and the University of the District of Columbia*, 29 DCR2975, Slip Op. No. 43, PERB Case No 82-N-01 (1982) proposals on procedural rights which do not restrain management's decisions are negotiable.

**Board:** The Board finds that there is insufficient evidence to make a determination in this matter. Therefore, the parties are ordered to brief this issue.

With regard to the Union's argument that this proposal was previously negotiated, the parties should note that pursuant to D.C. Code § 1-617.08(a-1) (Supp. 2005), "an act, exercise or agreement of the respective personnel authorities (management) shall not be interpreted in any manner as a waiver of the sole management rights contained in subsection (a) of this section".

### **ORDER**

#### **IT IS HEREBY ORDERED THAT:**

1. The following proposed Sections of Article 23 are **negotiable**.<sup>11</sup>

**Section D.1** - *contest reduction in grade or pay;*

2. The following proposed Sections are **nonnegotiable**:

**Section A.1** - *notice and bargaining over changes in job descriptions prior to implementation;*

**Section A.2** - *other duties as assigned shall not be used to assign work that is not reasonably related to position description; higher level duties on a continuing basis;*

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<sup>11</sup>All references to individual Sections pertain to Article 23 of the parties' proposed agreement.

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**Section E.1** - *bargaining over changes in job descriptions, job classification or evaluation process prior to implementation;*

**Section E.2** - *bargaining over grade and pay;*

3. The parties shall **brief the following issue:**

**Section F** - *employee's right to grieve the grade and/or classification of their position:*

The parties shall brief the above issue. Specifically, the parties shall address:

- (a) What procedure is in place for employees to grieve/appeal their grade and/or job classification?
  - (b) Is the procedure an in-house appeal procedure? Or, is it a grievance/arbitration (third party) procedure?
  - (c) Does the type of procedure impact on the negotiability of the proposal? If so, how?
  - (d) Management has a statutory right to determine the grades of positions pursuant to D.C. Code § 1-617.08(a)(5)(B). Does this right impact on the negotiability of this proposal? If so, how?
  - (e) Cite any rule, law, regulation or Board precedent in support of your position.
4. The parties' briefs shall be filed no later than **fifteen (15) days** from the service of this Decision and Order.
5. Pursuant to Board Rule 559.1, this Decision and Order is final upon issuance.

**PUBLIC EMPLOYEE RELATIONS BOARD**  
**Washington, D.C.**

February 14, 2007

Office of the Secretary of the  
District of Columbia

March 23, 2007

Notice is hereby given that the following named persons have been appointed as Notaries Public in and for the District of Columbia, effective on or after April 15, 2007.

Abney, Lakesha	New	Oak Management 80 M St, SE3620 20003
Abraham, Abeba	New	2236 S St, NE 20002
Adams, LaToya	New	Export/Import Bank 811 Vermont Ave, NW 20571
Aldersley, Susan	New	Mgt Systems International 600 Water St, SW 20024
Allen, Denise L.	New	H U D 820 First St, NE#300 20002
Armstead, Karlene	New	Housing Consultants 1717 K St, NW#600 20036
Blackwood, April	New	Blackboard Inc. 1899 L St, NW 5th Fl 20036
Bland, Rosa Elena	Rpt	P N C Bank 808 17 <sup>th</sup> St, NW 12th Fl 20006
Bonnell, Peter J.	New	2400 16 <sup>th</sup> St, NW#707 20009
Branch, Llewellyn M.	Rpt	Amer Logistics Assoc 1133 15 <sup>th</sup> St, NW#640 20005
Brewer, Angela Catherine	New	Leibner & Potkin 4725 Wis Ave, NW#250 20016

Bustos, Martha Elena	New	Hispanic Service Center 1805 Belmont Rd, NW#205 20009
Carpenter, Sonya M.	New	Washington Gas Light 101 Const Ave, NW 20080
Carpenter, Via Maria	New	3021 15 <sup>th</sup> St, NE 20017
Carroll, Sheila R.	Rpt	Kelley Drye Warren 3050 K St, NW#400 20007
Chase, Barbara J.	New	J. E. Wingfield & Assoc 700 5 <sup>th</sup> St, NW 20001
Coleman, Mary Helen	Rpt	Schiff Hardin 1666 K St, NW#300 20006
Colon, Gladys	New	Zuckerman Spaeder 1800 M St, NW#1000 20036
Connor, Bonnie M.	Rpt	Bracewell & Giuliani 2000 K St, NW#500 20006
Damille, Ricardy	New	4212 Nash St, SE 20020
Davis, Dalevonne A.	Rpt	Missionary Oblates 391 Michigan Ave, NE 20017
Davis, Ernest T.	New	Homeland Security/USCIS 111 Mass Ave, NW 20529
Davis, Kenya L.	Rpt	Kirkland & Ellis 655 15 <sup>th</sup> St, NW#1200 20005
Dolphin, Kelly M.	New	Katz Marshall Banks 1718 Conn Ave, NW 20009
Edwards, Debera L.	Rpt	Aetna 1331 F St, NW#450 20004
Elam, Althea Delores	New	OPM/General Counsel 1900 E St, NW#7353 20415

Ervin, Robert L.	Rpt	Isle of Patmos Bapt Ch 1200IsleofPatmosPlz,NE20018
Ewing, Todd	Rpt	Federal Title & Escrow 5335 Wis Ave,NW#700 20015
Farrell, Elizabeth M.	Rpt	For the Record 2300 M St,NW#800 20037
Farrow, Sandra G.	Rpt	Fed Mine Safety & Health 601 N J Ave,NW#9500 20001
Feder, Zev V.	Rpt	Feder Reporting 810 Cap Sq Pl,SW 20024
Finch, Meghan N.	New	Capital Reporting 1000 Conn Ave,NW#505 20006
Gant, Kecia	Rpt	Metropolitan Engineering 1150 17 <sup>th</sup> St,NW#301 20036
Gaydar, Teresa A.	Rpt	Holland & Knight 2099 Pa Ave,NW#100 20006
Geddes, Karen	New	Capital Reporting 1821 Jefferson Pl,NW 20036
Gipson, Vickie	Rpt	Citiwide Title & Escrow 2808 Douglas St,NE 20018
Gladden, Alice T.	Rpt	Justice Federal C U 935 Pa Ave,NW#8676 20535
Grantham, Cathy A.	Rpt	Fannie Mae 4000Wis Ave,NW#1000NT 20016
Gray, Venessa M.	Rpt	Merit Systems ProtctionBd 1615 M St,NW 20419
Greenleaf, Tanikka C.	Rpt	Arent Fox 1050 Conn Ave,NW 20036
Gross, Pamela G.	Rpt	Brickfield Bruchette ... 1025 ThJeff St,NW 20007

Hackler, Ellen M.	Rpt	Arent Fox 1050 Conn Ave, NW 20036
Harris, Glenetta M.	New	Public Defender Service 633 Indiana Ave, NW 20004
Hayes, Monica K.	New	Wash Gas Light Company 101 Const Ave, NW 20080
Hemphill, Rita	Rpt	Diversified Reporting 1101 16 <sup>th</sup> St, NW 20036
Henderson, Theresa	Rpt	N R H 102 Irving St, NW 20010
Heymann, Alan R.	Rpt	EOM/Communications 1350 Pa Ave, NW 20004
Hill-Bowles, LaKisha	New	Office/Admin Hearings 825 N Cap St, NE#4150 20002
Huscha, John	Rpt	Katten Muchin Rosenman 1025ThJeffSt, NW#700EL 20007
Johnson, Jane Lee	Rpt	Pillsbury Winthrop ... 2300 N St, NW 20037
Johnson, Towanda G.	New	Altria Corporate Services 101 Const Ave, NW#400W 20001
Kahssai, Zina A.	New	Amer Inst/Cancer Research 1759 R St, NW 20009
Kirby, Elizabeth D.	New	Barker Foundation 1066 30 <sup>th</sup> St, NW 20007
Kornilova, Natalia	New	Capitol Reporting 1000 Conn Ave, NW#505 20006
Kristy, Robert E.	Rpt	Hogan & Hartson 555 13 <sup>th</sup> St, NW 20004
LeRoux, Donna J.	New	A P T A 1666 K St, NW11th Fl 20006

Lewis, Markeete W.	New	Spriggs & Hollingsworth 1350 I St,NW 20005
Lockhart, Clarence O.	New	Wachovia Bank 1310 G St,NW 20005
Love, April	New	Dynamic Corporation 1818 N Y Ave,NW#206 20002
McCoy, Kevin A.	New	WRAMC/Ctr Judge Advocate 6900 Ga Ave,NW 20307
McIntyre, Valerie	New	Wilkie Farr Gallagher 1875 K St,NW 20006
Martin, Anita L.	Rpt	AMTRAK 60 Mass Ave,NE#4E312 20002
Martin, Letha R.	New	Heller Ehrman 1717 R I Ave,NW 20036
Myers, Leslie A.	Rpt	LawOffice/Douglas Herbert 1000 Conn Ave,NW#301 20036
Parker, Joyce	New	Law Office 1717 K St,NW#600 20036
Pate, Latasha	New	Hensel Phelps Construct'n 251 H St,NW 20001
Powers, James M.	New	DOJ/Free State Reporting 555 4 <sup>th</sup> St,NW#2905 20530
Regis, Tessa	Rpt	Natl Assessment Gov Bd 800 N Cap St,NW#825 20002
Richardson, Tia	Rpt	Public Defender Service 500IndianaAve,NW#C215 20001
Russell, Teri	New	Leo A. Daly 1201 Conn Ave,NW 20036
Sampson, Robin	Rpt	Amer Logistics Assoc 1133 15 <sup>th</sup> St,NW#640 20005

Sanchez, Agustin	New	2500 Wis Ave, NW#952 20007
Santos, Cintra M.	New	TIAA-CREF 1101 Pa Ave, NW#800 20004
Schenck, Ellen H.	New	Steptoe & Johnson 1330 Conn Ave, NW 20036
Scott, Christopher	New	Wash Consular Services 1000 Conn Ave, NW#1020 20036
Sellers, Brenda J.L.	New	Bureau/National Affairs 1231 25 <sup>th</sup> St, NW#S600 20037
Sidorsky, David	New	Baller Herbst Law Group 2014 P St, NW#200 20036
Stebbing, Mikiko D.	Rpt	4547 44 <sup>th</sup> St, NW 20016
Stepney, LaKisha L.	Rpt	Griffin & Murphy 1912 Sunderland Pl, NW 20036
Sylver, Nakeisha S.	New	Shiloh Baptist Church 1500 9 <sup>th</sup> St, NW 20001
Taylor, Valerie Joy	New	AAA Mid Atlantic 715 15 <sup>th</sup> St, NW 20005
Thaden, Joyce A.	Rpt	TechNet Law Group 1100 N Y Ave, NW#365W 20005
Thomas, Jeanette D.	Rpt	Dolphin & Evans Title 4308 Ga Ave, NW 20011
Thompson, Brendan S.	New	Cuneo Gilbert & LaDuca 507 C St, NE 20002
Vallowe, Claire L.	New	Washington Times 3600 N Y Ave, NW 20002
Varia, Marita C.	Rpt	Engraving & Printing FCU 13 <sup>th</sup> & C Sts, SW#215A 20228

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Vassallo, Jennifer M.	New	O P M 1900 E St, NW#1469 20415
Vogelsohn, Robert A.	Rpt	Demers Real Estate 1664 Columbia Rd, NW 20009
Walter, Anne F.	Rpt	People for the Amer Way 2000 M St, NW#400 20036
Washington, Rohnda P.	New	Miller & Chevalier 655 15 <sup>th</sup> St, NW#900 20005
Watson, Rosalyn M.	New	Library of Congress 101 Indep Ave, SE 20540
Whitfield, Roxana	Rpt	Inter-Amer Investment 1350 N Y Ave, NW 20577
Williams, Bertha M.	New	M H C D O 3939 Benning Rd, NE 20019
Williams-Kindred, Bettie J.	New	610 14 <sup>th</sup> St, NE 20002

**THE SEED PUBLIC CHARTER SCHOOL OF WASHINGTON, D.C.**

**REQUEST FOR PROPOSALS**

The SEED Public Charter School of Washington DC will receive bid proposals for the structuring and financing of a sale/leaseback of the existing facility at 4300 C Street, S.E., Washington, D.C. 20019 for continued use by SEED Public Charter School. The goal is to use New Markets Tax Credits for SEED Public Charter School to receive roughly \$0.50 of net equity for each \$1.00 of NMTC Allocation. Bid proposals are being accepted until April 13, 2007. At this time, proposals will be opened in the administrative offices located at 4300 C Street, S.E., Washington, D.C.

Dwight Crawford  
Chief Financial Officer

THE SEED PUBLIC CHARTER SCHOOL of Washington D.C.  
4300 C Street SE  
Washington DC 20019  
202-248-7773

**GOVERNMENT OF THE DISTRICT OF COLUMBIA  
OFFICE OF THE TENANT ADVOCATE**

**NOTICE OF WARD 1 EDUCATIONAL WORKSHOP**

The Department of Consumer and Regulatory Affairs' Office of the Tenant Advocate will present educational workshops in Ward 1 to assist residents in learning about their tenant rights. The workshop will be held on Saturday, April 14, 2007 from 10:00 a.m. until 3:00 p.m. at Bell Multicultural Senior High School, 3101 16<sup>th</sup> Street, NW.

The workshop will include sessions on the Rental Reform Amendment Act of 2006, Ins and Outs of Residential Housing inspections, Completing a Tenant Petition, Understanding Your Refusal of First Right (The Opportunity to Purchase Act - TOPA), Understanding the Condo Conversion Process and Eliminating Rats, Mice, Roaches and Bed Bugs.

Participants can meet one on one during a fifteen minute session with a volunteer attorney as part of the legal clinic. Spaces are limited.

The workshop is free and open to the public. For more information and for individuals with special needs contact the Office of the Tenant Advocate at 202/442-8359.

**CALENDAR YEAR 2007 WORKSHOPS**

Ward 1 April 14, 2007  
Ward 7 May 5, 2007  
Ward 2 June 2, 2007  
Ward 3 June 16, 2007  
Ward 6 September 8, 2007  
Ward 5 October 6, 2007  
Ward 4 November 3, 2007

For more information, please contact:

Ms. Delores Anderson  
Office of the Tenant Advocate  
Department of Consumer and Regulatory Affairs  
941 North Capitol St., NE, Suite 9500  
Washington, DC 20002  
delores.anderson@dc.gov  
202-442-8359

**GOVERNMENT OF THE DISTRICT OF COLUMBIA  
BOARD OF ZONING ADJUSTMENT**

**Application No. 17438 of Braden P. and Conner W. Herman**, pursuant to 11 DCMR § 3104.1, for a special exception to allow a two-story addition to a row dwelling under Section 223, not meeting the percentage of lot occupancy or court width provisions of §§ 403 and 406 at premises 628 East Capitol Street, N.E. (Square 868, Lot 805) in the R-4 District.

**Hearing Dates:** February 28, 2006, May 16, 2006 and September 5, 2006

**Decision Dates:** February 28, 2006, May 16, 2006 and October 3, 2006

**DECISION AND ORDER**

Braden P. and Conner W. Herman, the owners of Lot 805 in Square 868, filed a self-certified application with the Board of Zoning Adjustment (the "Board") on September 23, 2005, pursuant to 11 DCMR § 3104.1 for a special exception under Section 223 to construct a two-story-plus-basement addition to a row dwelling at premises 628 East Capitol Street, N.E. (Square 868, Lot 805). The public hearing was conducted on September 5, 2006. On October 3, 2006 the Board granted the application by a vote of 5-0-0.

**PRELIMINARY MATTERS**

Notice of Application and Notice of Hearing. The application was filed on September 23, 2005. By memoranda dated September 26, 2005, the Office of Zoning provided notice that the application had been filed, to the D.C. Office of Planning; Advisory Neighborhood Commission ("ANC") 6C, the ANC for the area within which the subject property is located; the ANC Commissioner for the affected single-member district; and the Ward 6 Councilmember.

The Board scheduled a public hearing on the application for February 28, 2006. On February 10, 2006, the applicant submitted a letter to the Board requesting a postponement of the hearing. The letter stated that the applicant wished to hire an expert firm to conduct a daylighting impact study to evaluate the light and air effects of the proposed addition on the abutting row dwelling at 626 East Capitol Street, N.E. (also "626"), a study that had been requested by the owners of 626, ANC 6C and the Office of Planning ("OP"). The postponement would also allow additional time for the applicants to discuss potential design modifications with the abutting neighbors at 626 East Capitol Street, N.E.

At its meeting of February 28, 2006 the Board granted the postponement and established a new hearing date of May 16, 2006.

On May 15, 2006 the applicant submitted a letter to the Board requesting a second postponement. The reason for the requested delay was to allow ANC 6C and the Capitol Hill Restoration Society time to evaluate the daylighting impact study, which had been completed.

**BZA APPLICATION NO. 17438****PAGE NO. 2**

At its meeting of May 16, 2006, the Board agreed to a further postponement, setting the hearing date as September 5, 2006.

On May 18, 2006 the applicant submitted to the Board a revised design for the proposed addition ("Scheme B"). The revision created a side setback on the second story level with the goal of allowing increased light and air to reach the row dwelling at 626 East Capitol Street, N.E. The applicant also transmitted to the record the completed daylighting impact study.

On August 20, 2006 the applicant submitted an affidavit of posting, indicating that one (1) zoning poster was posted on the site.

The applicant submitted its pre-hearing submission on August 22, 2006. The public hearing was conducted and completed on September 5, 2006.

Public Agency Reports. The Office of Planning submitted its report dated August 29, 2006, recommending approval of the application. OP noted that the applicant had developed a revised design ("Scheme B") to increase light and air to the neighboring property at 626 East Capitol Street, N.E. OP addressed the special exception criteria in § 223, concluding that the proposed addition complied with the criteria. OP also cited the results of the daylighting impact study by EMO Energy Solutions, Inc. as documenting that there will be very minor effects on the light and air available to 626 East Capitol as a result of the proposed addition. At the invitation of the Board at the public hearing, OP submitted a supplemental report dated September 19, 2006. In that report the Office of Planning reaffirmed its recommendation for approval, taking into account the opposition party's daylighting impact study and expert testimony by Tanteri + Associates, LLC. OP noted that the impact on light to the neighboring property from the Scheme B addition "is within the character of a row house form of development and does not rise to the level of unreasonable impact."

The Historic Preservation Review Board ("HPRB") granted conceptual design approval to the proposed addition at its April 2006 meeting. The Staff Report dated December 15, 2005 stated that "... the proposed addition can be considered compatible with the character of the historic district in terms of its overall size, height, massing and materials, and is consistent with other previously-approved rear additions."

Advisory Neighborhood Commission Report. By letter dated July 5, 2006, ANC 6C advised the Board that it had voted 7-0 to take "no position" on the application. The letter stated that the applicant had met several times with the ANC, but that the ANC did not have the technical resources or expertise to evaluate the applicant's and the opponent's daylighting impact studies, and accordingly deferred to the Board's resources and expertise.

Request for Party Status. The owners of the row dwelling at 626 East Capitol Street, N.E., which abuts the subject property, filed a request for party status in opposition on February 14, 2006. The owners, Madison and Solveig McCulloch, were represented by George R. Keys, Jr. of the law firm of Jordan & Keys, LLP. At its February 28 meeting, the Board granted the McCulloch's request for party status. ANC 6C was automatically a party in the case.

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The party in opposition contended that the proposed addition would adversely affect views of sky, greenery and sunlight access through the affected side windows. The current view from the McCulloch's living room windows is substantial green space and sky. The McCullochs contended that the proposed addition would result in a tunnel significantly impairing these features..

The party in opposition presented the expert testimony of Tanteri + Associates, LLC who conducted a "Daylight Reduction Analysis" and testified that sunlight reduction to 626 East Capitol would occur primarily on the 2nd level (bedrooms and bathroom) and northern most windows on the 1st level (kitchen), during morning hours, with the most significant reduction occurring during the summer period. The analysis concluded that the proposed addition would significantly reduce the skylight and sunlight available to the windows on the McCulloch's property.

Persons in Support. The property owners at 627 East Capitol Street, S.E. (across the street) and at 630 East Capitol Street, N.E. (abutting the subject property across the east-west alley) submitted letters in support of the application.

Persons in Opposition. Other than the party in opposition, there were no persons in opposition to the application.

Applicant's Representation. Representing the applicant was the law firm of Arnold & Porter LLP. At the public hearing the applicant presented testimony from expert witnesses and exhibits depicting the details of the proposed project.

**FINDINGS OF FACT**

1. The subject property is located at 628 East Capitol Street, N.E. (Square 868, Lot 805) on the north frontage of East Capitol Street in the Capitol Hill neighborhood. The subject lot is improved with a two-story-plus-basement, brick row dwelling and a carriage house oriented to the rear alley. The rear alley is 30 feet wide, and the east-west alley that abuts the subject property on the east side is 15 feet wide.
2. Lot 805 is 22.44 feet wide and 128.08 feet deep, with a land area of 2,869 square feet (rounded). The rear yard is 78 feet deep, and the existing lot occupancy is 62.6 percent.
3. The subject Square 868, bounded by East Capitol, A, 6th and 7th Streets, N.E., is developed predominantly with two- to four-story row dwellings, many of which have garages or carriage houses on the alley. There are also a number of small apartment houses and conversions to apartments on this block.
4. The subject property is zoned R-4 and is also within the boundaries of the Capitol Hill Historic District.

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5. The proposed project will remove the existing two-and-one-half story frame addition and replace it with a two-and-one-half story brick addition. The proposed addition will relocate the kitchen and family room from the basement to the main level and enlarge them. On the second floor the addition will accommodate two bedrooms. The basement addition will consist of a guest bedroom, mechanical equipment and a rear entryway with stairs up to ground level, as well as a stairway to the rear yard, covered by an areaway. There are steps behind the addition that go down to the garden level and a patio to be created there. A new brick fence with architectural detailing will be constructed along the side alley.
6. On May 18, 2006 the applicant submitted a revised design intended to allow more light and air to reach the neighbor's house and windows at 626 East Capitol Street, N.E.
7. The revised plan allows more light and air to reach the adjacent side of the house at 626 East Capitol Street. This is accomplished by creating a five-foot side setback at the 2nd floor level on the side of the property abutting 626, which has a small courtyard adjacent to the property line and some side windows. This side setback also mimics an existing 2nd floor setback that allows greater light and air penetration than the original design plan.
8. The requested special exception under § 223.1 is needed because the proposed addition does not comply with the R-4 lot occupancy limitation of 60 percent in 11 DCMR § 403 and does not comply with the width of open court requirement in § 406. The proposed lot occupancy is 69.9 percent, which is within the 70 percent maximum lot occupancy allowed as part of the special exception under § 223.3. The proposed lot occupancy is consistent with the intent of § 223 to allow reasonable additions to dwellings within certain guidelines, such as the 70 percent lot occupancy limitation.
9. The lack of compliance with the court width requirement is minor -- five feet provided vs. six feet required -- and results from the second-story court that was created in Scheme B to allow more light and air to reach 626 East Capitol Street, N.E. Also, the side setback as proposed mimics an existing side setback that exists on the frame addition to be demolished.
10. Regarding § 223.2(c), the visual effect on the character, pattern and scale of houses as viewed from the street frontage will be neutral or positive. The existing townhouse is fully in scale with the context of two to four story buildings in the vicinity. The front of the townhouse will not change, and the addition will be seen only in partial view looking down the north-south alley. Thus, the scale and rhythm of townhouses along the East Capitol Street frontage will be unchanged.
11. The brick addition is in keeping with the character of the Capitol Hill Historic District, is more attractive than the existing frame addition, and will be an aesthetic improvement to the immediate neighborhood. The Historic Preservation Review Board ("HPRB") granted Concept Design Approval in April 2006, indicating that the proposed addition is

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compatible with the character of the Capitol Hill Historic District and the immediate vicinity.

12. Subsection 223.2 requires that the proposed addition not have a "substantially adverse effect" on the use and enjoyment of abutting or adjacent properties, especially as to the light, air and privacy of neighboring properties. The applicant's testimony and evidence on this issue, with which this Board concurs, are summarized in numbers 13 to 21, following.
13. The houses across the east-west alley are separated by a carriage house and a 30-foot alley from the subject property, and the house across the north-south alley also has ample spacing from the proposed addition. The proposed addition will not affect the light, air or privacy of these houses. The primary property potentially affected is the abutting row dwelling at 626 East Capitol Street, N.E. There will be some effects on the light and air of 626 East Capitol, but these effects will be minor and acceptable in the context of the relatively dense urban development pattern typical of R-4 Districts.
14. On May 18, 2006 the applicant transmitted to the Board an expert study entitled, *Daylighting Impact Study & Analysis* by EMO Energy Solutions, Inc. ("EMO"), and later a supplemental "Cloudy Day" study. This analysis was requested by the neighbors at 626 and by the Office of Planning. These studies concluded that:

Scheme B for the renovation of 628 E. Capitol St. NE has no negative daylighting impact on 626 E. Capitol St. NE. Furthermore, during the afternoon periods light levels in some spaces increase due to the reflection off of the white painted west facing wall of 628. The only impact, if any at all, appears to occur in the early morning, during the summer season, in the kitchen at 626 E. Capitol Street. This is not a negative impact since the daylight during the specific time in question is still over seven times that recommended by the [Illuminating Engineering Society of North America]. Additionally, any reduction in unwanted direct sunlight will improve the daylighting in the space in question by reducing the contrast between light and dark, thereby reducing glare. The notching design of 'Scheme B' increases the daylight magnitude for the Dining Room, Bathroom, Middle Bedroom, and second floor Office as compared to 'Scheme A.'

15. The existing seven-foot-high fence along the property line with 626 means that the basement and first floor windows already have significant loss of sunlight and views.
16. The subject townhouse and its neighbors are situated on the north frontage of East Capitol Street, N.E., so that the light reaching the rear yards in question is primarily indirect, northern light rather than direct sunlight. This ameliorates the effects of the proposed addition on light reaching the neighbor's windows. Similarly, the supplemental Cloudy Day study performed by EMO shows that the effects of the addition on the

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neighbor's light and air are actually less on cloudy days than on sunny days. Such very limited effects do not constitute "substantially adverse effect" under § 223.2.

17. The proposed addition extends only 8' - 8" feet deeper at the rear than the existing frame addition. This is a very small extension in the context of 128-foot-deep lots and creates only a modest effect on light reaching the neighbor's windows. The townhouse at 626 East Capitol actually extends 16 feet deeper into its rear yard along its west property line than the existing structure at 628 East Capitol Street.
18. The property at 626 East Capitol has a five-foot court along its side property line with 628 East Capitol at the rear of the house, providing separation from the applicant's proposed addition. This is a standard and typical court providing light and air to urban townhouse windows. The applicant's land use expert testified at the public hearing that row dwellings are typically narrow, deep buildings attached at the sides. Consequently, a major challenge is to allow adequate natural light to reach interior rooms. Historically, a successful technique has been to create a narrow side court at the rear to allow for some windows on the side walls of two abutting houses. In effect, one court serves two houses. He submitted a map of Square 868 to the record (Exhibit 44), marked in color to show more than 15 instances of deep, narrow courtyards in this square alone similar to the court created by the proposed addition. This is a normal, rather than an adverse, condition in the Capitol Hill neighborhood and other congested townhouse neighborhoods.
19. The neighbor at 626 proposed at the public hearing that the addition be designed with a side court at 628 East Capitol along the common property line to create a double court. The Board agrees with the applicant that this concept would offer little value. The narrow space created next to the fenced property line would be essentially unusable. Also, the lack of building construction along the property line would force the addition to project deeper into the rear yard, using up valuable green space of a more useable type. The utility and traffic flow of interior rooms would also be adversely affected. Finally, provision of a side court on one townhouse of an abutting pair of houses is the more typical pattern on Capitol Hill, and the existing court is adequate for both properties.
20. As to any loss of privacy for the residents at 626, there will be no side windows facing 626 on the ground floor level of the addition. The two new side windows on the second floor mimic the location of existing second floor windows and will be separated from 626 by 10 feet. Accordingly, there will be no adverse privacy effect on the neighbors' use and enjoyment of their property.
21. The proposed addition and special exception will be fully in harmony with the purpose and intent of the Zoning Regulations and Zoning Map. The proposed addition will simply extend the depth of an existing row dwelling. The existing use is a matter-of-right use and is therefore a preferred use in the R-4 District. This application is also consistent with the intent of the Zoning Commission in adopting § 223 by Zoning Commission Order No. 840, effective March 13, 1998, which stated in part: "The purpose of the

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amendments is to provide a legal basis for making reasonable additions to single-family dwellings where the strict tests associated with an area variance are unattainable. The overall goal of the proposal is to provide a degree of flexibility regarding additions, while retaining essential controls related to effects on neighboring properties and neighborhood character."

### CONCLUSIONS OF LAW

The Applicant seeks a special exception under Section 223 pursuant to 11 DCMR § 3104.1 to allow construction of a two-story-plus-basement addition on the rear of a row dwelling in the R-4 District. The Board is authorized to grant special exceptions where, in the Board's judgment, a special exception would be in harmony with the general purpose and intent of the Zoning Regulations and Map and would not tend to adversely affect the use of neighboring property. Section 8 of the Zoning Act, D.C. Official Code § 6-641.07(g)(2). Pursuant to Section 223, the Board may permit an addition to a one-family dwelling or a flat that does not comply with normal requirements pertaining to minimum lot dimensions, lot occupancy, rear and side yards, courts and nonconforming structures, subject to the conditions enumerated in Section 223. The Applicant's property, with the proposed addition, seeks special exception relief from requirements pertaining to lot occupancy and width of open court.

Lot Occupancy. The maximum permitted lot occupancy in the R-4 District is 60 percent, whereas the application proposes a lot occupancy of 69.9 percent. The special exception criteria in § 223.3, however, allow a lot occupancy of up to 70 percent with the approval of the Board.

Width of Open Court. The applicant's proposed side setback of the second story of the addition creates an open court with a width of five feet, whereas a minimum width of six feet is required.

The Board concludes that the Applicant demonstrated compliance with the criteria in Section 223. As required by § 223.3, the lot occupancy of the property will be within the seventy percent (70%) allowed with Board approval. As to § 223.4, the Board sees no need to impose special design treatment beyond the features proffered by the Applicant and the proposed design. No nonconforming use is introduced by this special exception (§ 223.5).

The party in opposition contends that the applicant has failed to satisfy the requirement in § 223.2 that the "the addition shall not have a substantially adverse effect on the use or enjoyment of any abutting or adjacent dwelling or property . . ." The Board disagrees. The only neighboring building affected in any direct way is the abutting row dwelling on the west, at 626 East Capitol Street, N.E. The Board concludes that the Applicant's daylighting impact study demonstrated that the effects of the addition on the light and air available to the east-side windows of 626 will be partial and minor. The existing side court along the common property line will continue to provide interior light and air access in a manner that is quite common on Capitol Hill and in other row house neighborhoods. The Applicant's map of Square 868 in Exhibit 44 demonstrated that in just this subject square there exist more than 15 comparable courts serving two abutting residential dwellings.

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The Applicant's daylighting expert used a methodology that determined how much light entered each relevant room of 626 in terms of lumens, based on the angle of the sun at different times of the day and of the year. This study also accounted for reflections off of surfaces. The methodology of the opposing party's expert examined the view shed looking out through the side windows at 626 and accounted for how much of the previous sky view and view of open space would be obstructed by the Applicant's addition. The Board is of the opinion that the methodology of the Applicant's expert better addressed the question of overall potential adverse effect on the light and air reaching 626. That study found very minor effects on light and air access for 626. The Office of Planning, in its supplemental report, compared both daylighting impact studies and reaffirmed its recommendation for approval of the special exception. The Board also notes that the party in opposition's study did not account for the fact that the existing seven-foot-high fence along the property line already obscures part of the light reaching relevant basement and ground floor windows at 626.

As to any adverse effect on privacy, the only windows on the addition facing 626 will be on the 2<sup>nd</sup> story of the addition and will have ten feet of space from the side wall and windows of 626. Additionally, the position of the two new windows will be similar to the positioning of existing second floor windows. The Board concludes that the two new windows do not create privacy issues.

The Board further concludes, as required by § 223.2(c), that the addition will not create a visual intrusion on the character, scale and pattern of houses along the north frontage of East Capitol Street, N.E. in this vicinity, as viewed from the street. Moreover, the Historic Preservation Review Board has granted concept approval of the proposed addition, indicating that the property with the addition will be in keeping with the character, scale, materials and massing of the Capitol Hill Historic District.

The Board concludes that the project is in harmony with the general purpose and intent of the Zoning Regulations and Zoning Maps and will not tend to adversely affect the use of neighboring property in accordance with the Zoning Regulations and Maps.

**Great Weight to Office of Planning and ANC 6C**

The Board is required to give "great weight" to issues and concerns raised by the affected ANC and to the recommendations made by the Office of Planning. D.C. Official Code §§ 1-309.10(d) and 6-623.04. Great weight means an acknowledgement of the issues and concerns of these two entities and an explanation of why the Board did or did not find their views persuasive.

The Office of Planning recommended approval of the application, and the Board agrees with OP's analysis and recommendation.

ANC 6C voted unanimously to take "no position" on the application, leaving it to the Board and its support resources to analyze the two daylighting impact studies. The Board acknowledges receipt of the ANC's letter, which raises no substantive issues.

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Based on the above record before the Board and for the reasons stated above, the Board concludes that the Applicant has satisfied the burden of proof with respect to the application for approval of an addition as a special exception under Section 223 in the R-4 District.

It is therefore **ORDERED** that the Application is **GRANTED**.

**VOTE:**           **5-0-0**           (Geoffrey H. Griffis, Ruthanne G. Miller, John A. Mann II,  
Curtis L. Etherly, Jr. and Gregory N. Jeffries (by absentee ballot)  
to approve)

**BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT**

Each concurring Board member approved the issuance of this order.

**FINAL DATE OF ORDER:**   **MAR 29 2007**

UNDER 11 DCMR 3125.9, "NO DECISION OR ORDER OF THE BOARD SHALL TAKE EFFECT UNTIL TEN DAYS AFTER HAVING BECOME FINAL PURSUANT TO THE SUPPLEMENTAL RULES OF PRACTICE AND PROCEDURE FOR THE BOARD OF ZONING ADJUSTMENT."

PURSUANT TO 11 DCMR § 3130, THIS ORDER SHALL NOT BE VALID FOR MORE THAN TWO YEARS AFTER IT BECOMES EFFECTIVE UNLESS, WITHIN SUCH TWO-YEAR PERIOD, THE APPLICANT FILES PLANS FOR THE PROPOSED STRUCTURE WITH THE DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS FOR THE PURPOSES OF SECURING A BUILDING PERMIT.

PURSUANT TO 11 DCMR § 3125 APPROVAL OF AN APPLICATION SHALL INCLUDE APPROVAL OF THE PLANS SUBMITTED WITH THE APPLICATION FOR THE CONSTRUCTION OF A BUILDING OR STRUCTURE (OR ADDITION THERETO) OR THE RENOVATION OR ALTERATION OF AN EXISTING BUILDING OR STRUCTURE, UNLESS THE BOARD ORDERS OTHERWISE. AN APPLICANT SHALL CARRY OUT THE CONSTRUCTION, RENOVATION, OR ALTERATION ONLY IN ACCORDANCE WITH THE PLANS APPROVED BY THE BOARD.

IN ACCORDANCE WITH THE D.C. HUMAN RIGHTS ACT OF 1977, AS AMENDED, D.C. OFFICIAL CODE §§ 2-1401.01 ET SEQ. (ACT), THE DISTRICT OF COLUMBIA DOES NOT DISCRIMINATE ON THE BASIS OF ACTUAL OR PERCEIVED: RACE, COLOR, RELIGION, NATIONAL ORIGIN, SEX, AGE, MARITAL STATUS, PERSONAL APPEARANCE, SEXUAL ORIENTATION, GENDER IDENTITY OR EXPRESSION, FAMILIAL STATUS, FAMILY RESPONSIBILITIES, MATRICULATION, POLITICAL AFFILIATION, GENETIC INFORMATION, DISABILITY, SOURCE OF INCOME, OR PLACE OF RESIDENCE OR BUSINESS. SEXUAL HARASSMENT IS A FORM OF SEX DISCRIMINATION WHICH IS PROHIBITED BY THE ACT. IN ADDITION,

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**HARASSMENT BASED ON ANY OF THE ABOVE PROTECTED CATEGORIES IS PROHIBITED BY THE ACT. DISCRIMINATION IN VIOLATION OF THE ACT WILL NOT BE TOLERATED. VIOLATORS WILL BE SUBJECT TO DISCIPLINARY ACTION.**

SG

**GOVERNMENT OF THE DISTRICT OF COLUMBIA  
BOARD OF ZONING ADJUSTMENT**

**Application No. 17577 of City Vista L Street LLC, pursuant to 11 DCMR § 3104.1, for a special exception to establish accessory parking spaces (located in Square 515N) serving a presently under construction mixed-use residential/retail building under section 2116, in the DD/C-2-C District at premises 440 L Street, N.W. (Square 515, Lot 158).**

**HEARING DATE:** March 13, 2007  
**DECISION DATE:** March 13, 2007 (Bench Decision)

**SUMMARY ORDER**

**SELF-CERTIFIED**

The zoning relief requested in this case was self-certified, pursuant to 11 DCMR § 3113.2.

The Board provided proper and timely notice of the public hearing on this application by publication in the D.C. Register, and by mail to Advisory Neighborhood Commission (ANC) 6C and to owners of property within 200 feet of the site. The site of this application is located within the jurisdiction of ANC 6C, which is automatically a party to this application. ANC 6C submitted a letter in support of the application. The Office of Planning (OP) submitted a report in conditional support of the application.

As directed by 11 DCMR § 3119.2, the Board has required the Applicant to satisfy the burden of proving the elements that are necessary to establish the case pursuant to § 3104.1, for special exception under section 2116. No parties appeared at the public hearing in opposition to this application. Accordingly a decision by the Board to grant this application would not be adverse to any party.

Based upon the record before the Board and having given great weight to the OP and ANC reports the Board concludes that the Applicant has met the burden of proof, pursuant to 11 DCMR §§ 3104.1 and 2116, that the requested relief can be granted as being in harmony with the general purpose and intent of the Zoning Regulations and Map. The Board further concludes that granting the requested relief will not tend to affect adversely the use of neighboring property in accordance with the Zoning Regulations and Map.

Pursuant to 11 DCMR § 3101.6, the Board has determined to waive the requirement of 11 DCMR § 3125.3, that the order of the Board be accompanied by

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findings of fact and conclusions of law. It is therefore **ORDERED** that this application be **GRANTED** subject to the following **CONDITIONS**:

1. The Applicant shall provide evidence to the Zoning Administrator that it has executed a lease with the owner of the existing parking lot located at Lots 800,803-807, 821,840, 860, Square N-515 prior to the issuance of the Certificate of Occupancy for the residential "Building L" and that such lot can be used for the intended valet parking.

2. Approval shall not exceed **Nine (9) Months** from the date of the issuance of the Certificate of Occupancy for Building L.

**VOTE:** 4-0-1 (Geoffrey H. Griffis, Carol J. Mitten, Curtis L. Etherly, Jr., and John A. Mann II to approve; Ruthanne G. Miller not present not voting).

**BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT**

Each concurring member approved the issuance of this order.

**FINAL DATE OF ORDER:** **MAR 15 2007**

UNDER 11 DCMR 3125.9, "NO DECISION OR ORDER OF THE BOARD SHALL TAKE EFFECT UNTIL TEN DAYS AFTER HAVING BECOME FINAL PURSUANT TO THE SUPPLEMENTAL RULES OF PRACTICE AND PROCEDURE FOR THE BOARD OF ZONING ADJUSTMENT."

PURSUANT TO 11 DCMR § 3130, THIS ORDER SHALL NOT BE VALID FOR MORE THAN TWO YEARS AFTER IT BECOMES EFFECTIVE UNLESS, WITHIN SUCH TWO-YEAR PERIOD, THE APPLICANT FILES PLANS FOR THE PROPOSED STRUCTURE WITH THE DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS FOR THE PURPOSES OF SECURING A BUILDING PERMIT.

PURSUANT TO 11 DCMR § 3125 APPROVAL OF AN APPLICATION SHALL INCLUDE APPROVAL OF THE PLANS SUBMITTED WITH THE APPLICATION FOR THE CONSTRUCTION OF A BUILDING OR STRUCTURE (OR ADDITION THERETO) OR THE RENOVATION OR ALTERATION OF AN EXISTING BUILDING OR STRUCTURE, UNLESS THE BOARD ORDERS OTHERWISE. AN APPLICANT SHALL CARRY OUT THE CONSTRUCTION, RENOVATION, OR ALTERATION ONLY IN ACCORDANCE WITH THE PLANS APPROVED BY THE BOARD.

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PURSUANT TO 11 DCMR § 3205, FAILURE TO ABIDE BY THE CONDITIONS IN THIS ORDER, IN WHOLE OR IN PART, SHALL BE GROUNDS FOR THE REVOCATION OF ANY BUILDING PERMIT OR CERTIFICATE OF OCCUPANCY ISSUED PURSUANT TO THIS ORDER.

D.C. HUMAN RIGHTS ACT OF 1977, AS AMENDED, D.C. OFFICIAL CODE § 2-1401.01 ET SEQ., (ACT) THE DISTRICT OF COLUMBIA DOES NOT DISCRIMINATE ON THE BASIS OF ACTUAL OR PERCEIVED: RACE, COLOR, RELIGION, NATIONAL ORIGIN, SEX, AGE, MARITAL STATUS, PERSONAL APPEARANCE, SEXUAL ORIENTATION, FAMILIAL STATUS, FAMILY RESPONSIBILITIES, MATRICULATION, POLITICAL AFFILIATION, DISABILITY, SOURCE OF INCOME, OR PLACE OF RESIDENCE OR BUSINESS. SEXUAL HARASSMENT IS A FORM OF SEX DISCRIMINATION WHICH IS ALSO PROHIBITED BY THE ACT. IN ADDITION, HARASSMENT BASED ON ANY OF THE ABOVE PROTECTED CATEGORIES IS ALSO PROHIBITED BY THE ACT. DISCRIMINATION IN VIOLATION OF THE ACT WILL NOT BE TOLERATED. VIOLATORS WILL BE SUBJECT TO DISCIPLINARY ACTION. THE FAILURE OR REFUSAL OF THE APPLICANT TO COMPLY SHALL FURNISH GROUNDS FOR THE DENIAL OR, IF ISSUED, REVOCATION OF ANY BUILDING PERMITS OR CERTIFICATES OF OCCUPANCY ISSUED PURSUANT TO THIS ORDER.

rsn

**ZONING COMMISSION FOR THE DISTRICT OF COLUMBIA  
ZONING COMMISSION ORDER NO. 04-22A**

**Case No. 04-22A**

**(Approval to Modify an Approved Planned Unit Development for Property Located at 201  
and 225 I Street, NE; Square 751, Lots 802 and 803)**

**January 8, 2007**

Pursuant to notice, the Zoning Commission for the District of Columbia (the "Commission") held a public hearing on December 6, 2006 to consider an application from Broadway Capitol, LLC ("Applicant") to modify an approved planned unit development ("PUD") for property identified as Lots 802 and 803 in Square 751, also known as 201 and 225 I Street, NE ("Property"). The application was assigned Z.C. Case No. 04-22A. The Commission considered the application pursuant to Chapters 24 and 30 of Title 11, Zoning, of the District of Columbia Municipal Regulations ("DCMR"). The public hearing was conducted in accordance with the provisions of 11 DCMR § 3022. For the reasons stated below, the Commission hereby approves the application.

**FINDINGS OF FACT**

1. On July 12, 2006, the Applicant filed an application for review and approval of modifications to the PUD approved by Zoning Commission Order No. 04-22. (Exhibit 1)
2. The application proposed a modification to the approved roof plan to include architectural embellishments, enhanced and enlarged green roof areas, a consolidation and reduction in the number of vent chimneys, and a more refined treatment of roof-top areas for various types of recreational use. (Exhibit 1) The application was placed on the Commission's September 9, 2006 meeting agenda on the Consent Calendar.
3. The parties to the original PUD and related Zoning Map amendment application submitted letters to the Commission responding to the Applicant's proposal. The Stanton Park Neighborhood Association submitted a letter in support of the modifications, but expressed concern regarding the size of the proposed penthouses. (Exhibit 7) On August 31, 2006, Advisory Neighborhood Commission ("ANC") 6C filed a letter requesting postponement of the Zoning Commission's consideration of the application given its inability to review the application in time. (Exhibit 5)
4. On September 9, 2006, the Applicant requested that the Commission defer making a decision until ANC 6C had an opportunity to review the application. (Exhibit 9)

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5. The Near Northeast Citizens Against Crime and Drugs and ANC 6C submitted letters to the Zoning Commission in support of the application. (Exhibits 11 and 10, respectively)
6. At its October 16, 2006 public meeting, the Commission set the case down for a public hearing to be held on December 6, 2006, noting that the proposed modifications could not be considered "minor" for purposes of being decided on the Consent Calendar. In the interest of expediting the case, the Commission waived the requirement to file a supplemental filing pursuant to 11 DCMR § 3013.1.
7. On November 16, 2006, the Applicant submitted a supplemental filing that presented and discussed in detail the proposed modifications to the approved PUD. (Exhibit 14)
8. A public hearing was held on December 6, 2006. The Applicant's architect presented testimony regarding the proposed modifications to the approved PUD project. No other parties or persons spoke in support of the modification at the hearing. There were no parties or persons in opposition to the modification. At the close of the hearing, the Commission took proposed action to approve the modifications by a vote of 5-0-0.
9. The proposed action of the Zoning Commission to approve the application was referred to the National Capital Planning Commission ("NCPC") pursuant to § 492 of the District Charter. NCPC, by action dated December 28, 2006, found that the proposal would not adversely affect the federal interest or be inconsistent with the Comprehensive Plan for the National Capital.
10. The Commission took final action to approve the application in Case No. 04-22A on January 8, 2007, by a vote of 5-0-0.

#### MODIFICATION APPLICATION

11. The PUD was approved on March 24, 2005, pursuant to Z.C. Order No. 04-22, which also approved a related rezoning of the site from the C-3-A and the C-3-B Zone Districts to the C-3-C Zone District. The Commission approved the construction of 465-500 residential units, including 19,852 square feet devoted to affordable housing, and 500-525 parking spaces. The project was approved to contain 599,134 square feet of gross floor area, resulting in a density of 5.73 FAR. The residential buildings were approved at a height of 110 feet and a lot occupancy of 65 percent.
12. This application requests approval to modify the roof plan and the façade of the approved PUD. The modification of the roof design will include the elimination of the horizontal elements initially approved and the substitution of a pair of vertical towers at the south end of the west tower to mark the gateway to the H Street corridor. These towers are within the definition of tower in the 1910 Height Act.
13. The application also requests approval of changes in the size and configuration of the mechanical penthouses, increasing the floor area ratio ("FAR") of the penthouses by 0.4 percent. The increased FAR is needed to enclose the higher quality, energy efficient heating and air

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conditioning systems to be used in the buildings. The penthouses will be set back from the exterior walls of the buildings at least one foot per foot of vertical height.

14. The modified roof plan provides for a series of brick-faced vent shafts and exhaust fans for toilet, kitchen, and dryer exhausts that are permitted by the 1910 Height Act. The shafts and exhaust fans will be set back more than one foot per foot of height from all edges of the roof. A "green screen" will be provided between the piers. The green screen will be held in place by a horizontal element spanning the vent shaft piers.

15. The application requests approval of a modification to the façade of the building, including the windows, balconies, and materials. The windows will be subdivided into additional panes, and the quality of the window system will be upgraded. The number of balconies will be reduced as a result of refining the interior plans for each unit. The Applicant will use a screen-wall approach that allows the location of the window glazing to be at the brick line or inset without disrupting the general aesthetic expression of the facades. Finally, the masonry colors will be adjusted to be more compatible with existing historic buildings in the area. The quality of the bricks and the natural and cast stone will be the same as in the original PUD, but the colors will be refined to comport with surrounding buildings.

16. The following public benefits and project amenities will be enhanced as a result of the modifications.

- Historic Preservation of Private or Public Structures, Places, or Parks – The Applicant will refine the materials used in the façade of the building to enhance the historical significance of the Capital Children's Museum building and to be compatible with Daniel Burnham's railway cargo building, which is located across 2<sup>nd</sup> Street to the west. (Exhibit 14, p. 3)

- Urban Design and Architecture – The Applicant proposed the modifications to enhance the architecture and design of the building and to emphasize the building's status as the gateway to H Street. The Applicant proposed to introduce the vertical towers to mark the entrance into the H Street corridor and to refine the color palette of the materials to make the building compatible with other significant buildings in its vicinity. (Exhibit 14, pp. 1-3)

- Site Planning – The roof plan will be modified to provide residents and their guests with open and inviting spaces for entertainment and relaxation. (Exhibit 14, p. 2)

- Environmental Benefits – The roof elements will incorporate a green screen to act as a fence between the piers. Additionally, the quality of the window system will be upgraded as a part of these modifications. (Exhibit 14, p. 2)

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GOVERNMENT REPORTS

17. The Office of Planning ("OP"), in its report dated September 1, 2006, stated that it considered the proposed changes minor in nature, that OP did not object to the new roof plan as it appeared to meet the intent of the previous approval, and that the overall changes will have no effect on the zoning relief requested. (Exhibit 6)

ADVISORY NEIGHBORHOOD COMMISSION REPORT

18. ANC 6C adopted a unanimous resolution in support of the project at its regularly scheduled and publicly noticed meeting on October 11, 2006. The ANC, in its written resolution dated October 12, 2006, requested that the Applicant address safety and clean-up issues associated with the construction of the buildings. (Exhibit 10)

CONCLUSIONS OF LAW

1. Pursuant to the Zoning Regulations, the PUD process is designed to encourage high-quality developments that provide public benefits. (11 DCMR § 2400.1) The overall goal of the PUD process is to permit flexibility of development and other incentives, provided that the PUD project "offers a commendable number or quality of public benefits, and that it protects and advances the public health, safety, welfare, and convenience." (11 DCMR § 2400.2) The application is subject to compliance with D.C. Law 2-38, the Human Rights Act of 1977.
2. The development of this PUD, as modified, carries out the purposes of Chapter 24 of the Zoning Regulations to encourage well-planned developments that will offer a variety of building types with more attractive and efficient overall planning and design not achievable under matter-of-right development.
3. The Commission agrees with the testimony of the project architect and concludes that the proposed modifications are consistent with the Zoning Regulations and the intent of the original PUD approval.
4. The proposed modifications will not cause a significant adverse effect on any nearby properties. The modifications are appropriate and complement the existing adjacent buildings.
5. In accordance with D.C. Official Code §1-309.10(d) (2001), the Commission must give great weight to the issues and concerns of the affected ANC. The Commission takes note of ANC 6C's resolution in support of the project and has accorded to the ANC's decision the "great weight" consideration to which it is entitled.
6. Approval of the application will promote the orderly development of the Property in conformity with the entirety of the District of Columbia zone plan as embodied in the Zoning Regulations and Zoning Map of the District of Columbia.
7. Notice of the public hearing was provided in accordance with the Zoning Regulations.

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8. The Applicant is subject to compliance with D.C. Law 2-38, the Human Rights Act of 1977.

### **DECISION**

In consideration of the Findings of Fact and Conclusions of Law contained in this Order, the Zoning Commission for the District of Columbia **ORDERS APPROVAL**, consistent with this Order, of Zoning Commission Case No. 04-22A for modification to the original PUD approved by Zoning Commission Order No. 04-22, for the property identified as Lots 802 and 803 in Square 751. The approval of this PUD and Zoning Map Amendment is subject to the following guidelines, conditions, and standards:

1. The PUD shall be developed in accordance with the plans and materials submitted by the Applicant marked as Exhibit 14.
2. The conditions of approval of Zoning Commission Order No. 04-22 shall remain in full force and effect except as otherwise modified by this Order.
3. The modifications approved by the Zoning Commission shall be valid for a period of two (2) years from the effective date of this order. Within such time, an application must be filed for a building permit and construction of the project must start within three (3) years of the date of the effective date of this Order pursuant to 11 DCMR §§ 2408.8 and 2408.9.
4. The Applicant is required to comply fully with the provisions of the Human Rights Act of 1977, D.C. Law 2-38, as amended, and this Order is conditioned upon full compliance with those provisions. In accordance with the D.C. Human Rights Act of 1977, as amended, D.C. Official Code § 2-1401.01 *et seq.*, ("Act") the District of Columbia does not discriminate on the basis of actual or perceived: race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, familial status, family responsibilities, matriculation, political affiliation, disability, source of income, or place of residence or business. Sexual harassment is a form of sex discrimination, which is also prohibited by the Act. In addition, harassment based on any of the above protected categories is also prohibited by the Act. Discrimination in violation of the Act will not be tolerated. Violators will be subject to disciplinary action. The failure or refusal of the Applicant to comply shall furnish grounds for denial or, if issued, revocation of any building permits or certificates of occupancy issued pursuant to this Order.

On December 6, 2006, the Zoning Commission **APPROVED** the application by a vote of 5-0-0 (Carol J. Mitten, John G. Parsons, Anthony J. Hood, Gregory N. Jeffries, and Michael G. Turnbull).

On January 8, 2007, the Zoning Commission **ADOPTED** the application by a vote of 5-0-0 (Carol J. Mitten, Anthony J. Hood, Gregory N. Jeffries, John G. Parsons, and Michael G. Turnbull).

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In accordance with the provisions of 11 DCMR § 3028, this Order shall become final and effective upon publication in the *D.C. Register*; that is, on APR - 6 2007.

**ZONING COMMISSION FOR THE DISTRICT OF COLUMBIA  
ZONING COMMISSION ORDER NO. 02-50A**

**Z.C. Case No. 02-50A**

**Minor Modification of an Approved Planned Unit Development**

**Located at 2501 Wisconsin, N.W. (Square 1935, Lot 817)**

**September 25, 2006**

Pursuant to notice, the Zoning Commission for the District of Columbia (the "Commission") held a special public meeting on September 25, 2006. At the special public meeting, the Zoning Commission approved an application from St. Luke's Condominiums, LLC (the "Applicant") for a minor modification to an approved planned unit development ("PUD") to approve minor modifications to the building's façade and roof structures.

**FINDINGS OF FACT**

The original PUD application, Z.C. Case No. 02-50, involved both vacant land at the corner of Wisconsin Avenue and Calvert Street, N.W. and the land that was improved with St. Luke's United Methodist Church (Lots 817 and 818 in Square 1935). The original PUD approval was for the construction of a residential project that included 44 for-sale residential units in a building that had a measured building height of 40 feet, included approximately 85,000 square feet of gross floor area, and provided 104 total parking spaces (two parking spaces were to be conveyed with each residential unit and 16 spaces were to be reserved for guests). The PUD project was built pursuant to Zoning Commission Order No. 02-50, which became final and effective on November 14, 2003.

On July 14, 2006, the Applicant filed an application to obtain approval of certain modifications to the building's façade and the structures on the roof. The modification application did not include a request for any change in the size or height of the building on the Property or the number of residential units provided in the PUD project. On September 20, 2006, the Applicant filed additional materials depicting a revised building façade that was requested by Advisory Neighborhood Commission ("ANC") 3C, a party to the original PUD application.

On September 1, 2006, the Office of Planning ("OP") submitted a report that concluded the proposed modifications to the approved PUD project will be consistent with the intent of the Zoning Commission Order and that some elements are improvements over those of the approved PUD. OP further concluded that the PUD project continues to not be inconsistent with the Comprehensive Plan, as well as the purposes and standards of a PUD.

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At a regularly scheduled public meeting on September 11, 2006, the Commission determined that this application should be processed as a minor modification application pursuant to 11 DCMR § 3030.11. The Commission requested that the Applicant and the Director of the Office of Zoning take the necessary steps so that the application could be placed on the Commission's Consent Agenda for its special public meeting on September 25, 2006. At the September 25, 2006, special public meeting, the Commission voted 5-0-0 to approve the modification application as a minor modification.

### CONCLUSIONS OF LAW

Upon consideration of the record of this application, the Zoning Commission concludes that the Applicant's proposed modifications are minor and consistent with the intent of the previous PUD approval made in Zoning Commission Order No. 02-50. The Zoning Commission concludes that the proposed modifications are in the best interests of the District of Columbia and are consistent with the intent and purpose of the Zoning Regulations and Zoning Act.

The approval of the modifications are not inconsistent with the Comprehensive Plan. The modifications are of such a minor nature that their consideration as a consent calendar item without public hearing is appropriate.

In consideration of the reasons set forth herein, the Zoning Commission for the District of Columbia hereby orders **APPROVAL** of a minor modification to the building's façade and roof structures that were approved in Zoning Commission Order No. 02-50. All other provisions and conditions of Zoning Commission Order No. 02-50 remain in effect.

### DECISION

In consideration of the above Findings of Fact and Conclusions of Law contained in this order, the Zoning Commission for the District of Columbia orders **APPROVAL** of this application for modification of the approved PUD project in Z.C. Order No. 02-50.

Vote of the Zoning Commission taken at the special public meeting on September 25, 2006: 5-0-0 (Carol J. Mitten, Anthony J. Hood, Gregory N. Jeffries, John G. Parsons, and Michael Turnbull to approve).

In accordance with the provisions of 11 DCMR § 3028.29, this Order shall become final and effective upon publication in the *D.C. Register* on **APR - 6 2007**.

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